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No.

IN THE

Supreme Court of the United States

ROY A. COOPER, III, *et al.*,

Petitioners,

v.

R. DANIEL BOYCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court below permitted a defamation action filed against a candidate for public office by his opponent to proceed because a single political advertisement used the word "charg[ed]" instead of "sought" when referring to the attempted recovery of a legal fee. The court, relying solely on common law principles of defamation law and without addressing this Court's relevant precedents, held that the lawsuit could proceed if *any* of the statements in the advertisement were allegedly false and maligned the character of a candidate for public office. The court applied the same standards of falsity and defamatory injury to this quintessentially public speech critical of a candidate for public office as if the lawsuit had involved purely private speech critical of a business competitor.

The question presented is whether the decision below is consistent with the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, The Cooper Committee, Julia White, Stephen Bryant, and Kristi Hyman are petitioners here, and Boyce & Isley, PLLC, Eugene Boyce, Philip Isley, and Laura B. Isley are respondents here.

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PETITION FOR A WRIT OF CERTIORARI

North Carolina Attorney General Roy A. Cooper, *et al.*, respectfully petition this Court for a writ of certiorari to review the judgment of the North Carolina Supreme Court in this case.

OPINIONS BELOW

The decision of the North Carolina Supreme Court dismissing General Cooper's appeal and denying General Cooper's petition for discretionary review (Pet. App. 1a) is reported at 580 S.E.2d 361 (N.C. 2003). The decision of the North Carolina Court of Appeals (Pet. App. 3a) is published at 568 S.E.2d 893 (N.C. Ct. App. 2002), and its decision denying General Cooper's petition for rehearing (Pet. App. 22a) is unreported. The orders of the Superior Court (Pet. App. 23a) and the State Elections Board (Pet. App. 25a) granting General Cooper's motions to dismiss are unreported.

JURISDICTION

The North Carolina Supreme Court's decision dismissing General Cooper's appeal of right, and denying General Cooper's request for discretionary review, was entered on May 2, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a) and *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution, made applicable to the States by the Fourteenth Amendment, provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." The relevant provisions of North Carolina law are reprinted in the appendix (Pet. App. 42a).

STATEMENT OF THE CASE

In the course of a statewide campaign for Attorney General, petitioner ran a political advertisement on television that became the subject of a libel suit by his unsuccessful opponent. The court below permitted the libel action to proceed because, in the course of criticizing the opposing candidate, the advertisement used the word "charg[ed]" instead of "sought" when referring to the attempted recovery of a legal fee.

In reaching that extraordinary conclusion, the court treated quintessentially *public* speech critical of a *political* competitor as though it were purely *private* speech critical of a *business* competitor asserting a trade libel action. The court found the advertisement actionable because it allegedly contains "misstatements" and because "all of the statements" in it are allegedly not true. Similarly, the court held that, because the political advertisement "maligns" a person "in his business," it is defamatory. But while minor factual misstatements or harms caused to one's business reputation *might*, under circumstances not present here, suffice to sustain a libel claim under North Carolina law, they do not sustain from First Amendment attack a lawsuit based solely on core political speech and involving an asserted injury to a candidate's political reputation.

The First Amendment does not permit a state court to invoke common law principles of libel law to conflate campaign speech critical of a competing candidate for public office with garden-variety private speech uttered by one businessperson about another. The court below entirely ignored the constitutional constraints the First Amendment imposes on this lawsuit – constraints that myriad lower courts have recognized and respected. The decision below will have enormous chilling effects on core political speech – effects that have already been felt at the local and state level, and that will just as surely be felt at the national level as well. Accordingly, Court should grant the petition.

1. Petitioner Roy A. Cooper, III was the Democratic nominee for Attorney General of North Carolina in the 2000 election. Respondent Dan Boyce, the Republican nominee, was his opponent.

During the campaign, Boyce attempted to capitalize on his involvement as a lawyer in several high-profile tax refund cases that brought monetary relief to many North Carolina taxpayers. Pet. Att. 26a-27a. Those attempts were initially successful, and Boyce's involvement in these cases, including the so-called "tax protestor case," was widely reported by the media. *See, e.g.*, Editorial: *Council of State*, Greenville Daily Reflector, Oct. 13, 2000 ("In 1997 [Dan Boyce] helped sue the state over pension and intangible taxes, a case that overturned those taxes and won refunds for taxpayers from whom they were collected."); Paul O'Connor, *Nov. 7 Will Be a Test for 'Can't Miss' Politicians*, The Wilson Daily Times, Oct. 19, 2000 ("[Dan] Boyce is the son of Gene Boyce, the lawyer who has made a fortune suing the state. Dan has helped, and shares some of the credit for winning big tax refunds for some North Carolinians."). These media reports of Boyce's involvement – like Boyce's own statements – were received by prospective voters *before* the advertisement at issue here ever aired.

In response to the positive attention Boyce's professed involvement in these cases was garnering, General Cooper sponsored a television advertisement highlighting a *different* point of view on those same cases. The advertisement, which first aired on October 31, 2000, stated in relevant part that:

> I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad. * * * Dan Boyce – His law firm sued the State, *charging* $28,000 an hour in lawyer fees to the taxpayers. The judge said it shocks the conscience. Dan Boyce's law firm *wanted* more than a police officer's salary for each hour's work. Dan Boyce, wrong for Attorney General.

Pet. App. 4a (emphasis added). General Cooper won the election and currently serves as Attorney General.

2. On November 2, 2000, Boyce (and other members of his law firm) filed a complaint before the State Board of Elections, alleging that the advertisement was "false and was made intentionally or recklessly" by petitioners and violated North Carolina election law. Pet. App. 27a-28a (citing N.C. Gen. Stat. § 163-274(8)). Boyce asserted that the lawsuit referred to in the advertisement, the "*Smith* Class A" class action involving "protesting taxpayers," was settled by Eugene Boyce (Dan Boyce's father) but not by Dan Boyce's "law firm." Pet. App. 26a. Boyce did not dispute that he had been *involved* in the *Smith* Class A case, that the lawyers of record in that lawsuit had requested $23 million in fees, or that the judge overseeing the settlement opined on the record that that amount "shocked the conscience." Indeed, it was the judge himself who calculated that the aggregate fee request amounted to an hourly rate exceeding $28,000 per hour.

Following a hearing, the State Board of Elections, on December 20, 2000, unanimously dismissed Boyce's complaint, finding that "[t]he action of the Roy Cooper campaign in using the 23 million-dollar fee *request* in a political advertisement critical of R. Daniel Boyce * * * is not a violation of G.S. § 163-274 or any other election law or regulation of North Carolina." Pet. App. _a (emphasis added).[1] The Board concluded that, *inter alia*:

> R. Daniel Boyce and others on his behalf had asserted that he was involved in all the tax cases that involved the Boyce family lawyers. The Boyce family lawyers

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[1] N.C. Gen. Stat. § 163-274 provides in relevant part that it is a misdemeanor for "any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard to its truth or falsity."

> and law firm had handled several tax refund cases * * * * In at least one radio interview, R. Daniel Boyce claimed he was helping and advising his father, G. Eugene Boyce in all of the 'tax cases.' R. Daniel Boyce also was quoted in an article from the Raleigh *News and Observer* that he had helped his father on the 'intangible tax cases, working on the cases, but not billing.' He stated, 'we've been fighting for the people to get the money back.' Until the Cooper campaign used the negative aspect of the 23 million attorney fees request in the first tax case, R. Daniel Boyce used the Boyce family tax cases as a positive campaign issue.

Pet. App. 26a-27a.

3. On November 22, 2000, while his complaint before the Board of Elections was pending, Boyce filed a complaint in the Superior Court of North Carolina. Boyce conceded in the complaint that his law firm had been involved in several cases seeking tax refunds from the state, including the "*Smith/Shaver* intangibles tax case (non-protestor case)." Pet. App. 32a. He also conceded that the law firms of record in the *Smith* Class A lawsuit – a sub-class of protestor plaintiffs from the *Smith/Shaver* case – included his father, Eugene Boyce. *Id.* 34a. And nowhere did Boyce dispute his *involvement* in the *Smith* Class A lawsuit itself, including his involvement in the November 1997 proposed settlement that was the focus of General Cooper's advertisement – the very involvement upon which he had recently campaigned. Rather, Boyce alleged only that *his* "law firm" was not in existence at the time of the *Smith* Class A settlement in 1997. *Id.*

According to the complaint, the advertisement thus "conveyed directly and by innuendo" that Dan Boyce's law firm "unethically and unscrupulously 'charged' or was 'charging' every taxpayer in North Carolina $28,000.00 per hour in lawyer fees in a lawsuit that 'Dan Boyce's law firm' was currently handling or had handled." *Id.* 35a. In terms of

identifying a defamatory injury, the complaint alleged, *inter alia*, that the advertisement "injure[d] Dan Boyce by depriving him of the respect, confidence, and esteem essential to his candidacy for Attorney General." *Id.* 36a. Boyce asserted in the complaint causes of action for libel *per se*, slander *per se*, and statutory unfair and deceptive trade practices under N.C. Gen. Stat. §§ 75-1.1 *et seq.* Pet. App. 38a-41a.

Boyce concurrently served upon General Cooper "discovery requests" seeking, *inter alia*, "all documents, research, polls, or similar information created or used by the Cooper Campaign or prepared on behalf of the Cooper campaign." Plaintiffs' First Request for Production of Documents to Roy A. Cooper, III, Request No. 5. Boyce, who filed the complaint *pro se*, sought production of those documents directly to the four-lawyer firm that includes himself and his father.

General Cooper moved to dismiss the complaint on First Amendment grounds. Citing, *inter alia*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), General Cooper argued, *inter alia*, that the advertisement was "true or substantially true," and that it was not defamatory "in the context of a heated political campaign." Memo. in Support of Motion to Dismiss at 13, 24.[2] On April 6, 2001, the Superior Court dismissed Boyce's complaint with prejudice. *Id.* 23a-24a.

4. Respondents appealed the judgment to the North Carolina Court of Appeals. On September 17, 2002, the Court of Appeals reversed the judgment of the trial court. The case could move forward, the court reasoned, so long as

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[2] Cooper also argued that the complaint did not sufficiently allege that Cooper had made false statements with "actual malice" as required under the First Amendment by *New York Times*. Pet. App. 13a.

respondents' complaint sufficiently established both that the advertisement was false and that it defamed Boyce. Because the complaint satisfied both those conditions, the Court of Appeals held, the suit could proceed.

First, the court found that Boyce made a sufficient showing that the advertisement was "false" under North Carolina law. According to the court, Boyce's allegations that his law firm "did not exist in November of 1997," and that it had never "charged $28,000 an hour in lawyer fees," were sufficient to show "falsity" under North Carolina law. This holding was informed by the court's conclusion that falsity could be established by any "misstate[ments]," Pet. App. 6a, and that liability turned on whether "*all* of the statements in defendants' advertisement were true." *Id.* 20a (emphasis added). The Court of Appeals did not address General Cooper's argument that the advertisement was "substantially true" under *Masson*, 501 U.S. 496. Nor did the Court of Appeals address whether – apart from North Carolina common law – the First Amendment permits a libel action by a candidate for office to proceed based on an allegation of a misstatement rendering a political advertisement less than "entire[ly]" true.

Second, the Court of Appeals held that respondents sufficiently established that the advertisement defamed respondents. The court rested this part of its analysis almost entirely on a perceived distinction between the words "charged" and "sought":

> Although we agree with defendants that 'it is not libelous *per se* as a matter of law to state that an attorney sought a very large fee – not in the context of a $150 million class action lawsuit,' such is not the case here. Defendants' advertisement did not state that plaintiffs *sought* a very large fee – it stated that plaintiffs *charged* a very large fee.

Pet. App. 9a-10a (emphasis in original). Use of the word "charged," the court held, "suggests that, not only did plaintiffs receive such compensation at the taxpayers' expense, they did so without deference to the court." *Id.* 10a (emphasis added). The court also reasoned that, because the advertisement did not adequately describe the background context of the lawsuit, the "average viewer could not properly evaluate the claims being made by defendants against plaintiffs." *Id.* The court then concluded that "defendants' statements directly maligned plaintiffs *in their profession* by accusing them of unscrupulous and avaricious billing practices." *Id.* (emphasis added); *see also id.* 10a-11a ("the advertisement charged plaintiffs with committing contemptible *business* practices") (emphasis added).

In reaching this conclusion – without which the case could not have proceeded – the court did not cite any of this Court's precedents. Nor did the court acknowledge any role for the First Amendment in determining whether speech that is critical of a candidate for public office – and thus "maligns" a candidate "in his profession" – is defamatory. Rather, the court based its conclusion solely on principles of North Carolina common law. Thus, with respect to both falsity and defamation, the Court of Appeals treated the case as though it arose from a libel suit filed by one private lawyer against another for maligning his business reputation.[3]

5. General Cooper timely filed an appeal of right to the North Carolina Supreme Court, as well as two accompanying petitions for discretionary review. The North Carolina Supreme Court dismissed the appeal, and denied General

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[3] The court also held that the complaint set forth sufficient allegations concerning whether petitioners acted with "actual malice" as required by *New York Times*. Pet. App. 13a. And the court also rejected General Cooper's cross-appeal, affirming the trial court's refusal to take judicial notice of (i) several newspaper articles providing background information on the lawsuit, *see infra* at 3, and (ii) the decision of the Board of Elections. Pet. App. 18a-20a.

Cooper's petitions for discretionary review, in a decision entered on May 2, 2003. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS ON SEVERAL CRUCIAL FIRST AMENDMENT QUESTIONS.

"The application of the traditional concepts of tort law to the conduct of political campaigns is bound to raise dangers for freedom of speech." *Monitor Patriot Co.*, 401 U.S. at 275. This is *the* case in point. The court below, relying exclusively on common law principles of libel, cast aside the First Amendment's robust protections of core political speech. As a result, it was able to hold that any inaccuracy in a political advertisement is subject to tort liability and that a purported distinction between the words "sought" and "charged" is enough to make a political advertisement defamatory. The decision below should not stand and warrants the Court's review.

Although defamation "fundamentally is a state cause of action," its application is "replete with First Amendment implications." *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1077 (3d Cir. 1985). To afford free speech sufficient "breathing space," *New York Times*, 376 U.S. at 272 (internal quotations omitted), this Court has "constitutionalized" several key aspects of State defamation law. Lower courts have overwhelmingly respected (and even expanded) free-speech protections, either by identifying the external constraints imposed by the First Amendment or by embedding those protections in the underlying elements of state-law defamation claims.[4] Lower courts have also

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[4] *See, e.g., Orr v. Argus-Press Co.*, 586 F.2d 1108, 1111-12 (6th Cir. 1978) (noting that "courts attempt to mesh modern, first amendment principles with common law [defamation] precedents * * * but as a legal and practical matter, the two inquiries are bound together").

faithfully carried out this Court's precedents by making clear that First Amendment protections are at their height when state law is invoked in an effort to subject to tort liability core political speech – like a political advertisement – by one candidate about another. But the court below, instead of giving extra weight to the speech interests at issue, ignored the First Amendment entirely.

A. The First Amendment Limits The Application Of Traditional Common Law Defamation Principles.

The best known of the First Amendment constraints on state defamation law is the "federal rule that prohibits a public official from recovering damages for a defamatory falsehood * * * unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. Unlike private plaintiffs, public figures – and certainly candidates for public office – generally may engage in "self-help" to counteract statements made about them, by "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). And even with respect to purely private individuals, the First Amendment virtually always forbids a state from adopting a strict liability scheme "impos[ing] liability without fault." *Id.* at 347.

This case, though, turns more directly on two other – and no less fundamental – constitutional defamation rules. First is the rule that only "false" statements may be subject to tort liability by the States.[5] The dividing line between "truth"

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[5] The "plaintiff bears the burden of showing *falsity* * * * before recovering damages." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (emphasis added). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990) ("a statement on matters of public concern must be provable as false before there can be liability under state

and "falsity" is an elusive one, and one of the premises of the First Amendment is that "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For that reason, this Court has made clear that the First Amendment does not tolerate state-law notions of "falsity" that impose liability whenever a statement in the view of a state court falls short of absolute truth. *Time, Inc. v. Pape*, 401 U.S. 279 (1971), for example, involved a weekly news magazine article that omitted the word "alleged" from its description of a government investigatory report concerning police brutality. The Court held that the First Amendment precluded a defamation suit against the publisher. Despite the technical "falsification," and even assuming that the author *deliberately* omitted the word "alleged," the Court found the reported version to be "one of a number of *possible rational interpretations*" of the government document and thus sufficiently "true" that the First Amendment did not permit the imposition of liability. *Id.* at 290 (emphasis added).

Similarly, in *Masson*, the Court was confronted by a defamation action, filed by a public figure, alleging that an author and publisher had deliberately altered the contents of statements attributed to him as direct quotations. The Court rejected a cramped view that would have treated as "false" any alterations beyond grammar and syntax. Instead, the Court held, as a matter of First Amendment law, that "deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity * * * unless the alteration results in a *material* change in the meaning conveyed by the statement." 501 U.S. at 517 (emphasis added). Together, *Masson* and *Pape* "extend[] First Amendment protection to statements that are 'substantially

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defamation law, at least in situations, like the present, where a media defendant is involved").

true' – that is, 'supportable interpretations' of ambiguous underlying situations." *Hunter v. Hartman*, 545 N.W.2d 699, 707 (Minn. Ct. App. 1996) (citation omitted); *see also id.* ("remarks on a subject lending itself to multiple interpretations cannot be the basis of a successful defamation action").

The First Amendment imposes a final limit on state defamation law that is directly relevant here: an alleged defamatory injury must arise from the *false* statement, and not from other statements that do not meet the *Masson/Pape* standard for falsity. In *Masson*, the Court made clear that "[*m*]*inor inaccuracies* do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." 501 U.S. at 517 (emphasis added) (citation omitted). It follows that a statement is not actionable if "[t]he sting of the charge * * * is substantially true." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir. 1988) (Bork, J.); *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993) ("Falsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are thus not actionable. The rule making substantial truth a complete defense and the constitutional limitations on defamation suits coincide.").

B. First Amendment Limits On State Defamation Law Apply With Special Force To A Political Advertisement By A Candidate For Public Office Critical Of An Opponent.

The limits the First Amendment impose upon state defamation law are sharpest in contexts like this one: defamation charges arising out of political advertisements in which one candidate for office criticizes an opponent.

1. First, the nature of the speech in question demands the most robust protections under the First Amendment. Our Nation has a "profound * * * commitment to the principle that debate on public issues should be uninhibited, robust,

and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270.[6] This commitment extends to sharp attacks on candidates *seeking* public office, as well as those holding office. "Discussion on * * * the qualifications of candidates [is] integral to the operation of the system of government established by the Constitution. The First Amendment affords the *broadest protection* to such political expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (emphasis added); *see also Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose [of the First] Amendment was to protect the free discussion of government affairs. This of course includes discussions of candidates."). As the Court reaffirmed just last year: "Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms." *Republican Party v. White*, 536 U.S. 765, 781 (2002) (internal quotations omitted).

The First Amendment of course protects not only the rights of the public to criticize candidates for public office, but the rights of candidates themselves to speak freely on matters of public concern. "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395 (1962). This right benefits candidates, to be sure, but more fundamentally protects the public, as "one of the essential features of democracy is the presentation to the electorate of

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[6] Madison noted in 1800 that "the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidate respectively." 4 J. Elliot, *Debates On The Federal Constitution* 575 (1861).

varying points of view." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985). These varying points of view require "vigorous advocacy no less than abstract discussion." *New York Times*, 376 U.S. at 269 (internal quotations omitted).

In short, "it is difficult to conceive of a forum any more public than a political campaign." *Krueger v. Austad*, 545 N.W.2d 205, 215 (S.D. 1996) (internal quotations omitted).

2. The importance of the speech at issue in this context is not the only factor that demands the broadest First Amendment protections. Rather, for two distinct reasons, especially robust protections are required by the *nature* of a political advertisement itself.

The first reason is the "importance of context, because it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them." *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994). There is, put simply, no context in which the rhetorical nature of speech is both more important and more apparent than in a political advertisement aired less than a week before an election. As one court concluded:

> [W]e decline[] to find defamatory statements alleging 'half-truths,' 'innuendos,' and 'undue publicity' on the part of a candidate for public office, reasoning that a 'close analysis is hardly a realistic indication of how this publication would be read – labeled, as it is, a 'Political Advertisement.' Viewed in this context, we do not think [the defendant's] statements could reasonably be understood to be defamatory. To hold otherwise would be inconsistent with 'assur(ing) the vigorous debate that the First Amendment was designed to protect.'

Gouthro v. Gilgun, 427 N.E.2d 1166, 1168 (Mass. Ct. App. 1981) (citations omitted).

Indeed, several First Amendment decisions of this Court support the common-sense conclusion that the "context" of a political advertisement is likely to alert a viewer to the rhetorical nature of the content of that advertisement. *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), for example, involved newspaper articles stating that individuals attending a city council hearing involving a "controversial" subject had characterized a real estate developer's negotiation tactics as "blackmail." Rejecting the developer's argument that tort liability attached because the word "blackmail" implied the commission of a crime, this Court held that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable." *Id.* at 14. The Court reached a similar conclusion in *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), finding it "impossible to believe that any reader" would have understood a union newsletter's use of the word "traitor" to "be charging the appellees with committing the criminal offense of treason." *Id.* at 285.

The second reason that the nature of a political advertisement calls for heightened protections under the First Amendment is that "[t]he principal activity of a candidate in our political system * * * consists in putting before the [public] every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him." *Monitor Patriot*, 401 U.S. at 274. Thus, "the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary." *Id. See also Tiernan v. East Shore Newspapers, Inc.*, 116 N.E.2d 896, 898 (Ill. Ct. App. 1953) ("[W]hen anyone becomes a candidate for public office * * * he is considered as putting his character in issue in so far as it may respect his fitness and qualifications for the office, and

everyone may freely comment on his conduct and actions. His acts may be canvassed and his conduct boldly censured.").

C. The Decision Below, In Conflict With The Decisions Of This Court And Other Lower Courts, Ignored The Rigorous First Amendment Limits On A State Libel Action Based On A Political Advertisement.

This Court has reserved the question whether a candidate may ever, consistent with the First Amendment, have recourse under defamation law for attacks made on him or her by an opponent during a campaign. *Monitor Patriot*, 401 U.S. at 275 ("The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case."). While this case cleanly raises that question, the Court need not address it to conclude that the decision below departed from settled jurisprudence in permitting Boyce's lawsuit to proceed. Many lower courts, while stopping short of endorsing a *per se* rule against lawsuits based on the speech of one candidate for public office against another, have recognized that "[t]he overwhelming weight of authority is that campaign rhetoric is protected speech and, as such, recovery by a candidate is highly unusual." *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 955 (1996). The decision below, on the other hand, treated the very standard campaign rhetoric here as virtually unprotected speech, permitting this lawsuit to proceed without due regard for the First Amendment.

1. First, the court below made no room for the principle that statements containing "[m]inor inaccuracies," *Masson*, 501 U.S. at 517, are not actionable under the First Amendment so long as the "gist," *id.*, of the statement is "substantially true." *Liberty Lobby*, 838 F.2d at 1296.

Rather, the court simply took for granted that, so long as the complaint alleged that the ad contained "misstate[ments]," the lawsuit could proceed. Indeed, the court posed the question before it as whether "all of the statements in defendants' advertisement were true." Pet. App. 20a. But the First Amendment does not permit that microscopic analysis of protected speech, particularly in the confines of an advertisement by one candidate for public office critical of his opponent.

Because it premised its analysis on the flawed assumption that *any* inaccuracy in a political advertisement is subject to tort liability, the Court of Appeals went on to reach the flatly incorrect conclusion that a purported distinction between the word "charged" and the word "sought" was enough to allow this lawsuit to proceed. According to the court, use of the word "charged" – as opposed to "sought" – falsely "*suggest*[*ed*] that * * * plaintiffs *receive*[*d*] such compensation at the taxpayer's expense." Pet App. 10a (emphasis added). But the court cited no authority to support its linguistic finding that a fee "charged" is invariably a fee "received," and dictionary definitions refute that finding. *See, e.g.*, Webster's Third New Int'l Dictionary 377 (1993) (defining "charge" to mean "to fix or *ask* (a sum) as a fee or payment") (emphasis added). Indeed, even this Court has recently noted the difference between a fee that is "charged" and one that is actually "collected." *See Yellow Transp., Inc. v. Michigan*, 123 S. Ct. 371, 379 (2002) (Stevens, J., concurring in judgment) (noting that a State had "both collected *and* charged" a fee) (emphasis added).

Moreover, even if it were not already obvious that "charged" need not mean "received," the context of this advertisement makes the point unmistakable. Just two sentences after the word "charged" appears, the advertisement – in a passage ignored entirely by the court below – clarifies that "Dan Boyce's law firm *wanted* more than a police officer's salary for each hour's work." Pet.

App. 4a (emphasis). The term "wanted" should surely have alerted "even the most careless" viewer, *Bresler*, 398 U.S. at 14, that the advertisement referred to an amount requested, rather than received.

Taken as a whole, the only fair reading of the advertisement is that it refers to a fee request. But even if the term "charged" reasonably could be construed as "received," it is plain beyond dispute that it *also* could reasonably be construed as "sought." At the very least, in other words, use of the term "charged" could be interpreted in different ways. That is enough to mean that it cannot be treated as provably false, and it is therefore not actionable under the First Amendment. *See, e.g.*, *Krueger*, 545 N.W.2d at 214 (letters published during an election primary could "be viewed in a number of ways, and accordingly lack the specificity required to be characterized as facts").

The "context" of a political advertisement only cements that First Amendment conclusion. There is no category of speech in which rhetoric is more expected and, indeed, necessary to ensure robust debate between competing candidates – and the First Amendment thus requires States to afford leeway for terms with less than precise definitions. The court below did not even mention the context of this political advertisement, or this Court's express decision that a candidate may not "vaunt[]" his "record" and then "cry 'Foul!'" when an opponent "attempts to demonstrate the contrary." *Monitor Patriot*, 401 U.S. at 274. That is exactly what happened here: having campaigned on his record of obtaining tax refunds, Boyce cried "Foul!" when General Cooper engaged in core political counterspeech highlighting a different, less positive point of view concerning that record.

Nor is the First Amendment's "substantial truth" standard satisfied by the lower court's conclusion that an absence of background information about the lawsuit meant that the "average viewer could not properly evaluate" the claims made by General Cooper against his opponent. Pet. App.

10a. The relevant test asks whether the gist of the sting is substantially true, not whether a viewer could have "properly evaluate[d] the claims being made" with more background information. Indeed, this aspect of the court's holding is completely at odds with the most fundamental First Amendment principles applicable to political advertisements. A candidate has no right to full context and disclosure in his or her opponent's 30-second television advertisement. *Cf. Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (invalidating state right-of-reply statute for candidates). Any such rule would lead to intolerable self-censorship, as candidates would inevitably conclude that "the safe course is to avoid controversy" altogether. *Id.*[7] As one observer noted shortly after the decision below, "if judges start sending political advertising cases to juries because they portray candidates as contemptible without '(lending) context to the facts as alleged,' well, that'll change some ads, won't it? Some political reporting, too, perhaps. Earlier, we used the word 'squalid' in a sentence above. On second thought, we've taken it out." Bob Geary, *Malice in Politics? Actually, Maybe*, The Independent Weekly, Nov. 6, 2002, *available at* http://www.indyweek.com/durham/2002-11-06/citizen.html.

2. The Court of Appeals also took for granted that, under North Carolina common law, the advertisement was *defamatory* if it "maligned plaintiffs in their profession by accusing them of unscrupulous and avaricious billing

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[7] Moreover, a "fair and accurate" account of a "judicial proceeding" – like the settlement and fee request that were the subject of this ad – cannot be the basis of tort liability merely because it omits the full details that would permit a reader to "properly" evaluate the proceeding. *Liberty Lobby*, 838 F.2d at 1298. Under the lower court's holding, the advertisement may well have been actionable even had it stated that Boyce "sought" $23 million; it still would have lacked the background facts about contingent fees that the court thought would be helpful to the viewer.

practices." Pet. App. 10a-11a. In other words, as the complaint alleged, the ad was defamatory so long as it "injure[d] Dan Boyce by depriving him of the respect, confidence, and esteem essential to his candidacy for Attorney General." *Id.* 36a. Again, the Court of Appeals relied on the purported distinction between "sought" and "charged," this time to find the advertisement defamatory. That holding conflicts with the decisions of this Court and other courts with respect to at least three important First Amendment principles.

First, in assessing whether the political advertisement defamed Boyce, the court ignored that Boyce's "profession" was at the time a candidate for office, not simply a private lawyer.[8] In so doing, the court ignored the public's interest in "sharp attacks" that "malign" a candidate's fitness for office. In light of the "higher degree of protection to criticism of public officials under the First Amendment," *Long v. Egnor*, 346 S.E.2d 778, 787 (W. Va. 1986), other courts have held that, "[s]hort of allegations of crime or personal dishonesty, the First Amendment protects even sharp attacks on the character, motives, or moral qualifications of a 'public officer.'" *Id.* (quoting *Okun v. Superior Court*, 629 P.2d 1369, 1374 (Cal. 1981)); *see also Satterfield v. Borough of Schuylkill Haven*, 12 F. Supp. 2d 423, 443 (E.D. Pa. 1998) (holding that, where the "[p]laintiff [is] a candidate for public office," courts have recognized that, " [t]o prevent a chilling effect on free speech," the First Amendment holds "statements which * * * are annoying or embarrassing, are without more not libelous.") (internal quotations omitted). Put simply, General Cooper's

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[8] It is irrelevant that the advertisement may have *also* affected Boyce's *private* reputation as a lawyer. "The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964); *see also id.* ("[A]nything which might touch on an official's fitness for office is relevant.").

advertisement did not "malign" Boyce's *character as a candidate for public office* in a way in which the First Amendment permits the imposition of tort liability.

Second, even if the First Amendment generally permitted the imposition of tort liability for advertisements that malign a political candidate's character, the holding of the court below ignores that *this* advertisement did not, in fact, accuse Boyce of unethical – or "unscrupulous or avaricious – billing practices" at all. Pet. App. 10a. Rather, it *stated* only that Boyce's law firm charged $28,000 per hour, an amount that the judge said "shocks the conscience." Indeed, the court essentially acknowledged this problem, finding that the word charged "*suggests* that" Boyce "receive[d]" compensation, Pet. App. 10a. But the legal conclusion that, apart from what it actually states, the advertisement *suggests* "unscrupulous or avaricious" billing practices requires an interpretative extrapolation forbidden by the First Amendment. "Even though a false implication may be drawn by the public, there is no redress for its servant. Where public officers and public affairs are concerned, there can be no libel by innuendo." *Mello v. Conn. Republican State Cent. Comm'n*, No. 071896 2001 WL 1517411, at *3 (Conn. Super. Ct. Nov. 13, 2001) (internal quotations omitted).

Third, even if the advertisement actually *had* directly asserted that Boyce engaged in excessive (or, for that matter, "unscrupulous or avaricious") billing practices, that assertion would have been constitutionally protected opinion. As the Supreme Court of Kentucky held on remarkably similar allegations:

> It should be noted that although many of the allegedly defamatory statements that Welch complains of are disparaging, they are not so definite or precise as to be branded as false. Many of the phrases are figurative, and they employ rhetorical exaggeration to accomplish their intended purpose, which was to cast a political candidate in a negative light. For example, 'The City is

> *Broke* Because of His Mismanagement' and 'Frog Has *Squandered* 1 1/2 million dollars of Surplus Money' both contain language that defies precise definition * * * This type of generalized rhetoric banded about in a political campaign is not the language upon which a defamation lawsuit should be based, but instead is political opinion solidly protected by the First Amendment.

Welch v. Am. Publ. Co., 3 S.W.3d 724, 730 (Ky. 1999) (emphasis added) (internal quotations omitted); *see also Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) ("Hefty is the author's opinion of the mark-up * * * Hefty is just too subjective a word to be proved false [and] no reasonable reader would consider the term anything but the opinion of the author drawn from the circumstances related.") (internal quotations omitted); *cf. Beilenson*, 44 Cal. App. 4th at 952 ("[t]o charge a breach of ethics is not to charge a breach of the law. [Such] accusations were * * * entitled to the protection of the First Amendment.").

3. Even accepted as true, the complaint's allegation that "Dan Boyce's law firm" "did not exist in November of 1997," Pet. App. 6a, cannot possibly sustain this defamation action, and the court's reliance on that allegation cannot be reconciled with the First Amendment.

In the first place, the court's analysis was informed by the same, "any-technical misstatement-is-good-enough" theory of North Carolina defamation law that drove its parsing of "charged" and "sought" – a theory prohibited by the First Amendment, especially in this context. Indeed, before General Cooper's advertisement ever aired, Boyce had claimed credit for his involvement in the "*Smith* A", or so-called "tax protestor case," and received positive media attention for his professed role in those cases. As the Board of Elections concluded, "[u]ntil the Cooper campaign used the negative aspect of the 23 million attorney fee request in the first tax case, R. Daniel Boyce used the Boyce family tax

cases as a positive campaign issue." Pet. App. 27a. The complaint conspicuously does not allege – as it could not, given Boyce's prior campaign statements – that Boyce was not involved in that case. It also concedes that Boyce's father (with whom Boyce later joined in practice) was counsel in that case and further concedes that Boyce's law firm *was* involved in highly-related litigation, including the *Smith/Shaver* class action, of which *Smith* A was a sub-class. The court's holding was thus plainly not guided by any search for "substantial truth," which would otherwise have led the court to conclude that the advertisement was not actionable. *See, e.g.*, *Liberty Lobby*, 838 F.2d at 1296 (affirming judgment on the pleadings where article's statements concerning link between plaintiff and third party were substantially true and noting that speakers "should not be required to convert the results of investigative journalism into a Standard & Poor's report on the formalities of corporate structure").

More important, of course – and entirely dispositive on its own – is that the question of whether Dan Boyce's law firm existed in November of 1997 is of no moment whatever to the question of defamatory injury. In other words, any injury to Dan Boyce that flowed from the advertisement flowed from something other than the suggestion that his law firm was in existence in 1997. The court below recognized this much, resting its finding that the ad was defamatory entirely on its flawed analysis of the distinction between "charged" and "sought." Because any inaccuracy as to whether Dan Boyce's law firm was in existence at the time Boyce was involved in the *Smith A* case has nothing to do with the "sting" of the ad, *see Masson*, 501 U.S. at 517, it could not be the basis for a defamation action even if it otherwise met the *Masson* standard for "falsity." In short, then, this case hinges exclusively on the perceived distinction between

"charged" and "sought" – the only statement identified as both false and defamatory by the decision below.[9]

II. THE DECISION BELOW CHILLS CORE POLITICAL SPEECH AT THE LOCAL, STATE, AND NATIONAL LEVELS, AND REQUIRES THIS COURT'S IMMEDIATE REVIEW.

"Freedoms of expression require 'breathing space." *Hepps*, 475 U.S. at 772 (quoting *New York Times*, 376 U.S. at 272). But as long as it is permitted to stand, the decision below eliminates that breathing space, profoundly chilling political speech that lies at the heart of the First Amendment. It is essential that the Court intervene now to resolve the conflict between the decision below and the Court's own First Amendment precedents.

1. The chilling effect of the regime established below is patent. Every time a candidate for political office releases a political advertisement – or, for that matter, makes a campaign speech, participates in a candidate debate, or engages in any number of campaign activities – he or she invites a defamation suit that could culminate in devastating financial liability. "The fear of damage awards under a rule such as that invoked by the [State] court[] here may be

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[9] Respondents' statutory claim of unfair and deceptive trade practices under N.C. Gen. Stat. §§ 75-1.1 *et seq.* is precluded by the First Amendment for the same reasons. Indeed, respondents expressly alleged in the complaint that their unfair and deceptive trade practices claim could be sustained only if their "Libel/Slander *Per Se* claims [were also] successful." Pet. App. 40a. The Court of Appeals thus held that the "defamation claim, if proven, properly supports a claim for unfair and deceptive trade practices." *Id.* 15a. In any event, a civil plaintiff may not overcome the First Amendment's limitations on libel law by invoking some other state-law-based remedy. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988) (First Amendment precludes plaintiffs from evading dictates of *New York Times* by asserting intentional infliction of emotional distress claim rather than libel claim).

markedly more inhibiting than the fear of prosecution under a criminal statute." *New York Times*, 376 U.S. at 277.

All it takes to set the litigation machinery in motion, according to the Court of Appeals, is a bare allegation of actual malice and a single word – say, "charged" instead of "sought" – that strikes a court as poorly chosen, or used without enough "context" to allow the average voter to "properly evaluate the claims being made." Pet. App. _a. The result is entirely foreseeable: candidates, to the extent they are willing to campaign at all, will have to engage in the kind of cautious "self-censorship" that is anathema to the First Amendment. *See Gertz*, 418 U.S. at 340 (overly stringent liability can "lead to intolerable self-censorship"). And the ultimate loser, of course, is the public, deprived of the kind of robust debate that should inform its choices. *See Monitor Patriot* 401 U.S. at 271-72 (First Amendment was intended to "assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people") (internal quotation omitted).

What may be less obvious are the ways in which the campaign setting aggravates the chilling effect produced by North Carolina's defamation law. Losing candidates have every incentive to take advantage of the state's generous defamation regime – not necessarily to protect their reputations, but to exact revenge against victorious candidates or to gain strategic advantage in the next election cycle. Every successful candidate, in other words, has reason to fear a post-election lawsuit.

This case is a prime example. Boyce, who alleged in the lawsuit that the advertisement was "intended to affect the chances of Dan Boyce as a candidate," Pet. App. 36a, may well face off against General Cooper in a future election. If he does, then this lawsuit will have been a tremendous boon to his political prospects. Boyce is seeking voluminous discovery related to confidential campaign strategy, including, for instance, "all documents, research, polls, or

similar information created or used by the Cooper Campaign or prepared on behalf of the Cooper Campaign." Plaintiffs' First Request for Production of Documents to Roy A. Cooper, III, Request No. 5.[10] Discovery requests like that, with minimal or no relevance to any legal claim, are intended not only to harass former opponents, but to obtain highly confidential campaign documents that will pave the way for a rematch.[11]

The expense of discovery, the loss of campaign secrecy, and the possibility of an adverse judgment collectively wreck havoc on the political process. Those harms would be felt particularly keenly by candidates with small war-chests, as the "time, cost and expense of exposing candidates for public office to litigation for libel suits * * * might impose substantial litigation costs on candidates with fewer resources who might be less willing to engage in the rough and tumble which public campaigns often entail." *Martin v. Griffin*, No. CV 9905861335, 2000 WL 872464, at *19 (Conn. Super. Ct. June 13, 2000). The possibility, or even the likelihood, that a candidate/defendant ultimately will prevail offers little security. A finding that a defendant has not acted with the requisite "actual malice," for instance, will often come too late in the day to spare the candidate the myriad costs associated with defamation litigation. *See, e.g.*, David A. Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev.

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[10] *See also, e.g.*, Plaintiffs' First Request for Production of Documents to Roy A. Cooper, III, Request No. 7 ("all documents, including final or draft reports, memoranda, statements, or polls related to the preparation of any print, radio, or television advertisements that were used by the Cooper Campaign or prepared on behalf of the Cooper Campaign); *id.*, Request No. 26 ("all documents, including final or draft reports, memoranda, statements, which were provided to you or any Defendant member of the Cooper Campaign by any agent or employee of another political campaign committee").

[11] A protective order is of little comfort, at least where, as here, the plaintiffs are lawyer-politicians representing themselves *pro se*.

422, 456 (1975) (*New York Times* "operates too late in the litigation process")

Given the incentives to sue in the campaign setting and the costs imposed even by the early stages of litigation, sensible candidates will have no choice but to edit every public utterance with an eye toward future defamation suits. Indeed, the entirely predictable rush to take advantage of the decision below has begun already. Within months of the North Carolina court's decision, the losing candidate in the 2002 election for North Carolina's 13th Congressional District had filed a defamation suit against the winning candidate. *See Grant v. Miller*, No. 02-CVS-17172 (Wake County, N.C., Super. Ct. filed Dec. 27, 2002). That suit, now pending, is sure to be joined by others. Unless this Court acts now, the "chief energies of the courts, for some time after every political campaign, [will] be absorbed by libel and slander suits," *Monitor Patriot*, 401 U.S. at 274 n.4 (citation omitted).

Nor will the chilling effect of the state court decision be limited to candidates who run for office in North Carolina. Candidates for national office, too, will be subject to the defamation regime announced in the opinion below. Under North Carolina law, a national candidate may be subject to the jurisdiction of North Carolina courts whenever the "offending material" is "circulated" in North Carolina or involves a reputational injury suffered in North Carolina. *Saxon v. Smith*, 479 S.E.2d 788, 793 (N.C. Ct. App. 1997) (finding personal jurisdiction satisfied over out-of-state defendant who circulated a newsletter to "100 residents of North Carolina"). If a candidate for national office runs an advertisement in North Carolina, or appears in a debate viewed in North Carolina, or campaigns publicly in North Carolina, then he or she can expect to be sued in North Carolina. The decision below will affect the national political debate as well as the state-wide debate, chilling

candidate speech and limiting the supply of political information available to citizens all over the country.

2. There is no bar to immediate review of the state court decision. That decision is "final" with respect to the First Amendment issue and reviewable under 28 U.S.C. § 1257. *See Cox Broad. Co. v. Cohn*, 420 U.S. 469, 482-83 (1975) (describing "fourth exception" to finality rule); *see also Miami Herald Publ.*, 418 U.S. at 246-47, 247 n.6. The state court definitively adjudicated the First Amendment question raised here, and if General Cooper is successful at trial, there will be no other opportunity for federal review of the constitutional issue presented. *See Cox*, 420 U.S. at 482-83. Reversal of the state court on First Amendment grounds would be entirely "preclusive of any further litigation on the relevant cause of action." *Id.*[12] And, as described just above, a "refusal immediately to review the state-court decision might seriously erode federal policy," *id.*, by immediately chilling core political speech and thus "restricting the present exercise of First Amendment rights," *Miami Herald*, 418 U.S. at 247 n.6. Indeed, "[a]djudicating the proper scope of First Amendment protections . . . often has been recognized by this Court as a 'federal policy' that merits application" of the fourth *Cox* category. *Fort Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989).

Likewise, there are no pragmatic or prudential grounds for postponing review – and certainly none that could outweigh

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[12] This case is therefore distinguishable from *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003), in which the Court dismissed the writ of certiorari as improvidently granted. In *Nike*, some Justices were concerned that even a First Amendment ruling in petitioner's favor might not bring the state-court litigation to a close. *See id.* at 2556 (Stevens, J., joined by Ginsburg, J.); *but see id.* at 2563-64 (Breyer, J., joined by O'Connor, J.) (disagreeing). Here, by contrast, reversal on First Amendment grounds necessarily would entail a holding that the ad in question cannot constitutionally be made the basis for a defamation suit – a holding that would end this lawsuit altogether.

the immediate chilling effect of the decision below on political speech. No amount of discovery – and, thus, no subsequent motion for summary judgment or pre-trial motion – will change the court's holding that the advertisement, as a matter of North Carolina law, may *only* be interpreted to assert that Boyce "receive[d]" over $28,000 per hour, rather than just asking for that sum.

Accordingly, this is not the kind of case that would benefit from further factual development on proceedings below. The case turns entirely on a single political advertisement, the substance of which is on the record and undisputed. Only one, perfectly straightforward, question is presented: whether respondents may go forward with a defamation action based on the content of that advertisement.[13] Additional information will shed no light on that question, and the Court should answer it now. *See, e.g.*, *Long*, 346 S.E.2d at 787 ("Most courts in other jurisdictions have also held that the court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning.").

Under these circumstances, this Court's timely intervention is entirely appropriate. Indeed, it is essential.

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[13] The simplicity with which the issues are presented here also distinguishes this case from *Nike*. The *Nike* litigation involved a number of different statements by Nike which appeared in a number of different contexts. At least some Justices appear to have believed that resolution of the case would be facilitated if the case were further developed and perhaps streamlined in the state courts. *See* 123 S. Ct. at 2559 (Stevens, J., joined by Souter and Ginsburg, JJ.).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

DATED: July 30, 2003

Respectfully submitted,

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APPENDIX

APPENDIX A

BOYCE & ISLEY, PLLC, Eugene Boyce, R. Daniel Boyce, Philip R. Isley, and Laura B. Isley

v.

Roy A. COOPER, III, The Cooper Committee, Julia White, Stephen Bryant, and Kristi Hyman

No. 598P02.

Supreme Court of North Carolina.

May 1, 2003.

Alan W. Duncan, Allison O. Van Laningham, Henry E. Frye, Jim W. Phillips, Jr., David Kushner, Greensboro, for Cooper et al.

R. Daniel Boyce, Philip R. Isley, Laura B. Isley, Raleigh, for pro se.

Prior report: 153 N.C. App. 25, 568 S.E.2d 893.

ORDER

Upon consideration of the petition filed by Defendants for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Denied by order of the Court in conference, this the 1st day of May 2003."

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendants in this matter pursuant to G.S. 7A-30 (constitutional question), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the notice of appeal is

> "Dismissed ex mero motu by order of the Court in conference, this the 1st day of May 2003."

Upon consideration of the petition filed by Defendants in this matter for discretionary review of additional issues of

the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 1st day of May 2003."

Upon consideration of the alternative petition filed by Defendants in this matter for discretionary review of Constitutional Issues of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 1st day of May 2003."

Chief Justice LAKE; Justices PARKER and ORR recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of May 2003.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

/s/ Carol B. Templeton
Carol B. Templeton,
Assistant Clerk

APPENDIX B

Court of Appeals of North Carolina.

BOYCE & ISLEY, PLLC, Eugene Boyce, R. Daniel Boyce, Philip R. Isley, and Laura B. Isley, Plaintiffs,

v.

Roy A. COOPER, III, The Cooper Committee, Julia White, Stephen Bryant, and Kristi Hyman, Defendants.

No. COA01-880.

Sept. 17, 2002.

Appeal by plaintiffs from order entered 6 April 2001 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 April 2002.

Boyce & Isley, PLLC, by G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley, and Laura B. Isley, pro se, Raleigh, plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey, & Leonard, L.L.P., by Jim W. Phillips, Jr., Raleigh, and David Kushner, and Smith Helms Mulliss & Moore, L.L.P., by Alan W. Duncan, Greensboro, for defendant-appellees.

TIMMONS-GOODSON, Judge.

The law firm of Boyce & Isley, PLLC, and its member attorneys G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley and Laura B. Isley (collectively, "plaintiffs") appeal from an order of the trial court dismissing plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the reasons set forth herein, we reverse in part the order of the trial court.

The facts relevant to this appeal are as follows: On 2 November 2000, plaintiffs filed a complaint with the State Board of Elections. The complaint alleged that a political advertisement sponsored by the campaign of Roy Cooper,

the Democratic nominee for the Office of Attorney General of North Carolina, violated section 163-274(8) of the North Carolina General Statutes, which prohibits "any person to publish ... derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity[.]" N.C. Gen. Stat. § 163- 274(8) (2001).

During the pendency of the action before the State Board of Elections, plaintiffs filed a similar complaint in Wake County Superior Court alleging that Roy Cooper, along with the Cooper Committee (collectively, "defendants") published a false and fraudulent political television advertisement during the North Carolina election campaign for the Office of Attorney General. Plaintiffs alleged that the advertisement defamed R. Daniel Boyce ("Dan Boyce"), the Republican nominee for the Office of Attorney General, as well as the member attorneys of the Boyce & Isley law firm. The complaint recited verbatim the content of the advertisement at issue, the audio portion of which is reproduced here as follows:

> I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.
>
> ....
>
> Dan Boyce--his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.
>
> The Judge said it shocks the conscience.
>
> Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.
>
> Dan Boyce, wrong for Attorney General.

Plaintiffs alleged that defendants' publication of the above-stated advertisement was defamatory *per se* and constituted unfair and deceptive trade practices. Further,

plaintiffs accused defendants of conspiring to violate statutory section 163-274(8), referenced *supra*, and requested a declaratory judgment regarding defendants' alleged violation of such statute.

On 20 December 2000, the State Board of Elections dismissed plaintiffs' complaint. On 6 April 2000, the trial court also granted defendants' motion to dismiss plaintiffs' complaint on all claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. From this order, plaintiffs appeal.

On appeal, plaintiffs bring forth two assignments of error, arguing that the trial court erred in dismissing their claims against defendants for defamation and for unfair and deceptive trade practices. By cross-appeal, defendants assign error to the trial court's refusal to take judicial notice of the order of the State Board of Elections dismissing plaintiffs' complaint. We examine plaintiffs' and defendants' arguments in turn.

I. Plaintiffs' Appeal

In their first assignment of error, plaintiffs contend that the trial court erred by dismissing their claim for defamation. Plaintiffs argue that their complaint states a valid claim for defamation against defendants upon which relief may be granted. We agree.

A motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure tests the legal sufficiency of the complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001); *Fuller v. Easley,* 145 N.C. App. 391, 397-98, 553 S.E.2d 43, 48 (2001). When ruling on a motion to dismiss, "the trial court must take the complaint's allegation[s] as true and determine whether they 'are sufficient to state a claim upon which relief may be granted

under some legal theory.' " *Id.* (quoting *Taylor v. Taylor*, 143 N.C. App. 664, 668, 547 S.E.2d 161, 164 (2001)). The ultimate issue on a motion to dismiss is not " 'whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 381 (1987)(quoting *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986)). Thus, a claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 134-35 (1991).

In the instant case, plaintiffs' complaint set forth a claim for defamation against defendants, including libel per se and slander *per se*. In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person. *See Tyson v. L'eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987). There is no dispute in the instant case that the statements made by defendants were intentionally published to the public at large. Therefore, we address the first three elements of plaintiffs' defamation claim, namely that the statements were (1) false, (2) defamatory, and (3) of or concerning plaintiffs. We therefore turn to the facts as alleged in plaintiffs' complaint.

In support of the first element for defamation, that of falsity, plaintiffs argue that their complaint sets forth specific facts that, if true, demonstrate that defendants' advertisement misstated several fundamental facts. Specifically, the complaint alleged that, contrary to the stated facts of the advertisement, "Dan Boyce's law firm" did not exist in November of 1997, the time period during which, according

to the advertisement, the law firm sued the state. Further, the complaint denied that "Dan Boyce's law firm" had ever "charg[ed] $28,000 an hour in lawyer fees[,]" as stated in the advertisement.

We conclude that plaintiffs set forth sufficient specific facts to support their claim that the statements made by defendants were false. If proven, the above-stated facts would show that defendants' advertisement contained several central errors of fact, publication of which tended to falsely imply that plaintiffs had sued the state and demanded excessive fees for their work at the expense of taxpayers. We next determine whether plaintiffs have set forth sufficient facts alleging defamation.

In North Carolina, the term defamation applies to the two distinct torts of libel and slander. Libel *per se* is "a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). Slander per se is "an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease." Id. When the defamatory words are spoken with an intent that the words be reduced to writing, and the words are in fact written, the publication is both libelous and slanderous. *See Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, disc. review denied, 327 N.C. 426, 395 S.E.2d 675 (1990). "[F]alse words imputing to a merchant or business

man conduct derogatory to his character and standing as a business man and tending to prejudice him in his business are actionable, and words so uttered may be actionable per se." *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955); *see also Ausley v. Bishop*, 133 N.C. App. 210, 214-15, 515 S.E.2d 72, 76 (1999) (holding that, where the plaintiff moved for summary judgment on the defendant's counterclaim for slander per se, there was sufficient evidence to support the defendant's claim where the defamatory statements made by the plaintiff had the capacity to adversely affect the defendant in his profession). In an action for libel or slander per se, malice and damages are deemed presumed by proof of publication, with no further evidence required as to any resulting injury. *See Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993).

Plaintiffs alleged in their complaint that, the statements by defendants that "Dan Boyce's law firm" had "sued the state" and "charg[ed]" the taxpayers an hourly rate greater "than a police officer's salary" plainly and falsely accused plaintiffs of unethical billing practices in their profession. The complaint alleged that defendants' advertisement was defamatory per se in that it tended to "disparage Boyce & Isley, PLLC and its member attorneys' professional reputation and honesty in billing clients, and states that they engage in unethical conduct[,]" thereby depriving plaintiffs of the "respect, confidence and esteem essential to Plaintiffs' professional status in commerce and the business community." Further, plaintiffs alleged that such remarks were published in reckless disregard of their truth or falsity. Thus, argue plaintiffs, the complaint properly stated sufficient facts to support the claim that defendants' advertisement was defamatory.

Defendants argue that the advertisement was not defamatory in that the statements made therein are "reasonably susceptible of a non-defamatory interpretation."

Defendants correctly note that, in order to be libelous per se, defamatory words "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Flake v. News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938). Whether a publication is libelous per se is a question of law for the court. *See Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990). When examining an allegedly defamatory statement, the court must view the words within their full context and interpret them "as ordinary people would understand" them. *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 319, 312 S.E.2d 405, 409, *cert. denied*, 469 U.S. 858, 105 S. Ct. 187, 83 L. Ed. 2d 121 (1984); *Flake*, 212 N.C. at 786, 195 S.E. at 60.

Defendants contend that the average person is familiar with the concept of contingency fees in the context of large class-action lawsuits and understands that attorneys are sometimes generously compensated for their participation in such suits. Defendants therefore argue that their assertion that "Dan Boyce's law firm" "charg[ed]" "more [per hour] than a policeman's salary" did not imply unethical conduct by plaintiffs or otherwise impugn them in their profession. On the contrary, defendants contend that such statements imply that plaintiffs are "highly-skilled, top-notch" attorneys who "play[] for big rewards [.]" According to defendants, plaintiffs' defamatory claim cannot stand without resorting to extrinsic facts and innuendo, thus rendering it "susceptible of a non-defamatory interpretation." We disagree.

Although we agree with defendants that "it is not libelous per se as a matter of law to state that an attorney sought a very large fee--not in the context of a $150 million class action lawsuit[,]" such is not the case here. Defendants' advertisement did not state that plaintiffs sought a very large

fee--it stated that plaintiffs charged a very large fee. There is an important distinction between these two words, of which defendants, in crafting the text of their advertisement, were undoubtedly aware. The word "sought" or "seeking" indicates that plaintiffs submitted their request for compensation to the court. The fact that plaintiffs sought extraordinary compensation, moreover, does not imply that plaintiffs actually received such compensation. In contrast, the term "charged" or "charging" suggests that, not only did plaintiffs actually receive such compensation at the taxpayers' expense, they did so without deference to the court. Contrary to defendants' argument, we do not believe the average layperson to be so familiar with the intricacies of class-action lawsuits as to know that the courts must approve of attorney compensation in such suits.

Further, defendants' advertisement did not indicate that the case for which plaintiffs purportedly "charged" the taxpayers exorbitant fees was a large class-action lawsuit. Nor did it mention the term "contingency fees." Without this vital information to lend context to the facts as portrayed in the advertisement, the average viewer could not properly evaluate the claims being made by defendants against plaintiffs. Instead, the average viewer was left solely with the following information about plaintiffs: that they (1) sued the State; (2) charged (and therefore received) $28,000 per hour to taxpayers to do so; (3) that this sum represented more than a policeman's annual salary; and (4) that a judge had pronounced that plaintiffs' behavior " shocked the conscience." One does not have to "read between the lines" to discover the advertisement's defamatory content. *See Renwick*, 310 N.C. at 318, 312 S.E.2d at 409.

We hold that the allegedly false statements, when viewed through the eyes of an average person and in the context of the advertisement as a whole, are defamatory per se. Defendants' statements directly maligned plaintiffs in their

profession by accusing them of unscrupulous and avaricious billing practices. Contrary to defendants' contentions, no innuendo or reference to ethical rules governing attorney conduct is necessary to conclude that the advertisement charged plaintiffs with committing contemptible business practices. *See Ellis*, 326 N.C. at 224, 388 S.E.2d at 130 (holding that the language in a letter by the defendant company, taken in the context of the entire letter, was defamatory, in that it accused the plaintiff company of committing an unauthorized act and so impeached the plaintiff company in its trade). Nor do we conclude that such accusations were ambiguous. We doubt that defendants intended their advertisement as a compliment to plaintiffs' skills and abilities as "top-notch" attorneys, and we do not conclude that the average person would otherwise interpret the advertisement in a non-derogatory fashion. *See McKimm v. Ohio Elections Comm.*, 89 Ohio St. 3d 139, 146, 729 N.E.2d 364, 372 (2000) (holding that, where a cartoon published by a candidate for political office unambiguously depicted the opposing candidate engaging in unlawful and unethical activity, such cartoon was not reasonably susceptible to more than one meaning and was thus defamatory), *cert. denied*, 531 U.S. 1078, 121 S. Ct. 776, 148 L. Ed. 2d 674 (2001).

Having determined that plaintiffs' complaint properly pled specific facts supporting the first two elements of defamation, we now examine whether the complaint supports the third element, namely that the defamatory statement was "of or concerning the plaintiffs." It is well established that "[i]n order for defamatory words to be actionable, they must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them [defamatory]." *Arnold v. Sharpe*, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979). For example, a defamatory statement accusing

"someone" in a group of nine persons of misconduct will not support an action for defamation by a member of that group. *See Chapman v. Byrd*, 124 N.C. App. 13, 17, 475 S.E.2d 734, 737 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 50 (1997). Where a statement defames a small group or class of persons in its entirety, however, any member of that class may pursue an action for defamation, despite the fact that the statement fails to specifically identify that particular individual. *See Carter v. King*, 174 N.C. 549, 553, 94 S.E. 4, 6 (1917)(holding that one of the members of an eleven-member jury could maintain a cause of action for libel where the defamatory statement imputed misconduct to the entire group); see generally Debra T. Landis, Annotation, *Defamation of Class or Group as Actionable by Individual Member*, 52 A.L.R.4th 618 (1987) (discussing claims brought by individual members of a defamed group or class).

In the instant case, there is no dispute that the political advertisement reproduced in plaintiffs' complaint specifically identified the individual plaintiff R. Daniel Boyce. Defendants contend, however, that the reference to "Dan Boyce's law firm" in the advertisement does not identify the law firm of Boyce & Isley or its member attorneys. Thus, argue defendants, any defamatory statements contained in the advertisement did not concern plaintiffs other than R. Daniel Boyce. We disagree. The fact that the advertisement did not specifically name each present plaintiff does not bar their suit. *See Carter*, 174 N.C. at 552, 94 S.E. at 6. By claiming that "Dan Boyce's law firm" had committed unethical business practices, defendants maligned each attorney in the firm, of which there are only four. Moreover, we conclude that identification of the law firm of Boyce & Isley, PLLC, was readily ascertainable from the reference to "Dan Boyce's law firm." We therefore conclude that plaintiffs' complaint properly supported the fact that the defamatory statements were "of or concerning" plaintiffs.

Defendants argue that plaintiffs cannot succeed on their claim for defamation because they are public figures, and because defendants published their statements in the course of a political campaign. Defendants correctly note that a public figure may not prevail on a claim for defamation unless he proves that the defamatory statements were made with actual malice. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 725-26, 11 L. Ed. 2d 686, 706 (1964); *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 664-65 (2000), *cert. denied*, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001). A statement is made with actual malice where it is published "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 280, 84 S. Ct. at 726, 11 L. Ed. 2d at 706. "Under North Carolina law, an individual may become a limited purpose public figure 'by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.' " *Gaunt*, 139 N.C. App. at 786, 534 S.E.2d at 665 (quoting *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 435, 291 S.E.2d 852, 857 (1982), *disc. review denied*, 307 N.C. 459, 298 S.E.2d 385 (1983)). Defendants offer no conclusive evidence, however, that all of the present plaintiffs are public figures, limited purpose or otherwise.

Furthermore, although plaintiff R. Daniel Boyce certainly qualifies as a public figure due to his candidacy for public office, plaintiffs alleged in their complaint that defendants acted with actual malice. Among other allegations, plaintiffs stated that they repeatedly informed defendants as to the alleged falsity of their statements, but that defendants continued to publish the offending advertisement. Moreover, contrary to defendants' arguments, "the actual-malice standard is not an impenetrable shield for the benefit of those who engage in false speech about public figures." *McKimm*, 89 Ohio St. 3d at 147, 729 N.E.2d at 373

(holding that there was sufficient evidence of record at trial to support a decision by the Ohio Elections Commission reprimanding a successful candidate for political office for his false and misleading political cartoon depicting the opposing candidate engaging in unethical behavior). The context of a political campaign does not alter the fact that

> "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth." "The use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Id. (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125, 133 (1964)) (citations omitted).

The allegations in plaintiffs' complaint sufficiently pled their claim of defamation by defendants to overcome a Rule 12(b)(6) motion to dismiss. *See Dockery v. Florida Democratic Party*, 719 So. 2d 9, 11 (Fla. Dist. Ct. App. 1998) (holding that, where the husband of a candidate for political office filed a claim for defamation based on remarks made by the opposing candidate during the campaign, such complaint sufficiently alleged a cause of action for defamation such as to survive the defendants' motion to dismiss); *see also Pritt v. Republican National Committee*, 210 W. Va. 446, 453, 557 S.E.2d 853, 863 (2001) (holding that the plaintiff, an unsuccessful candidate for the office of governor, presented sufficient evidence to support her defamation claim for statements made about the plaintiff during the political campaign such that the trial court erred in

granting summary judgment to the defendants). Whether or not plaintiffs may ultimately prevail on these claims is not a matter before this Court. *See Johnson*, 86 N.C. App. at 4, 356 S.E.2d at 381; *see also Dockery v. Florida Democratic Party*, 799 So. 2d 291, 297 (Fla. Dist. Ct. App. 2001) (holding that the trial court correctly granted summary judgment to the defendants where the plaintiff failed to present sufficient evidence of his defamation claim). Because plaintiffs' complaint properly set forth the elements of a defamation claim, the trial court erred in dismissing this claim. *See Andrews*, 109 N.C. App. at 275, 426 S.E.2d at 432. We therefore turn to plaintiffs' next assignment of error.

In their second assignment of error, plaintiffs contend that the trial court erred by dismissing their claim for unfair and deceptive trade practices. Plaintiffs argue that their defamation claim, if proven, properly supports a claim for unfair and deceptive trade practices by defendants. We agree.

At the outset, we note again the standard for granting a motion to dismiss. Plaintiffs' complaint would only be properly dismissed if it "[f]ail[ed] to state a claim upon which relief can be granted[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

A claim under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant. *See Rawls & Assocs. v. Hurst*, 144 N.C. App. 286, 293, 550 S.E.2d 219, 224, *disc. review denied*, 354 N.C. 574, 559 S.E.2d 183 (2001). "[A] libel per se of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1, which will justify an award of damages ... for injuries proximately caused." *Ellis*, 326 N.C. at 226, 388

S.E.2d at 131. Similarly, slander per se may constitute a violation of section 75-1.1. *See Ausley*, 133 N.C. App. at 216, 515 S.E.2d at 77. To recover, a plaintiff must have suffered actual injury as a proximate result of the deceptive statement or misrepresentation. *See Ellis*, 326 N.C. at 226, 388 S.E.2d at 131; *Ausley*, 133 N.C. App. at 216-17, 515 S.E.2d at 77.

We observe that, under section 75-1.1(b), the term "commerce" "includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b) (2001). Thus, professional services rendered by an attorney in the course of his business are exempt under the statute and may not form the basis of an unfair or deceptive trade practices claim. *See Sharp v. Gailor*, 132 N.C. App. 213, 217, 510 S.E.2d 702, 704 (1999). We do not read section 75-1.1(b), however, to preclude an attorney from pursuing an unfair and deceptive trade practices claim. Thus, the mere fact that plaintiffs are learned professionals whose business activities defendants maligned does not remove plaintiffs' claim for defamation outside of the scope of section 75-1.1.

As we have determined, plaintiffs in the instant case properly pled all of the elements for a libel per se claim. Moreover, the alleged libel impugned plaintiffs in their profession by accusing them of unethical business practices. Plaintiffs' complaint alleged that such behavior by defendants constituted unfair and deceptive trade practices and caused actual injury to plaintiffs. Thus, plaintiffs' complaint stated a claim for unfair and deceptive trade practices upon which relief may be granted. *See Ellis*, 326 N.C. at 226, 388 S.E.2d at 131 (holding that there was sufficient evidence presented to the jury to properly support an unfair and deceptive trade practices claim where such claim was based on libel per se impeaching the plaintiff in its

business); *Ausley*, 133 N.C. App. at 216, 515 S.E.2d at 77 (holding that there was a sufficient forecast of evidence at summary judgment to properly support a claim under Chapter 75 where such claim was based upon slander *per se*).

Defendants argue that, as the objectionable statements were published during a political campaign, section 75-1.1 cannot apply. Defendants assert that such statements can have no effect on the consuming public, or the plaintiffs' business activities, and that the statements therefore are not within the purview of section 75-1.1. We do not agree.

We perceive no compelling grounds, nor do defendants advance such, to distinguish defamatory remarks concerning one's trade or profession made during the course of a political campaign from those made in some other forum. As noted supra, it is well established that a defamatory statement impeaching a business man in his trade or profession may constitute an unfair or deceptive act affecting commerce. *See Ellis*, 326 N.C. at 226, 388 S.E.2d at 131; *Ausley*, 133 N.C. App. at 216, 515 S.E.2d at 77. We disagree with defendants' argument that the context of a political campaign substantially alters the impact of such statements upon commerce. We note that the defamatory remarks published in *Ellis* and *Ausley* were published to a limited number of people. *See Ellis*, 326 N.C. at 222, 388 S.E.2d at 129 (defamatory letter published to "several buyers"); *Ausley*, 133 N.C. App. at 215, 515 S.E.2d at 76 (defamatory statement published to "several clients"). In contrast, plaintiffs alleged in the instant case that defendants' statements were published to "well over 1 million people[.]" If defamatory remarks concerning one's trade or profession affect commerce, as has been held, we fail to see how the context of a political campaign, with its wide-spread broadcast of such statements by multiple media, can lessen rather than heighten the impact upon commerce.

Because plaintiffs' complaint properly stated the elements of a claim for unfair and deceptive trade practices upon which relief may be granted, the trial court erred in dismissing this claim. It will be plaintiffs' substantial burden, as this case progresses, to provide sufficient evidence to support their claim that they have suffered actual injury as a result of defendants' actions. At this juncture, however, they are entitled to proceed with their claims. We now examine defendants' assignment of error on appeal.

II. Defendants' Appeal

By cross-appeal, defendants contend that the trial court erred by declining to take judicial notice of the order by the Board of Elections ("the Board") dismissing plaintiffs' complaint. Defendants also argue that the trial court should have taken judicial notice of various newspaper articles concerning the election campaign. Defendants argue that the findings and conclusions made by the Board, as well as the newspaper articles, provide an absolute defense to plaintiffs' claims. By failing to take judicial notice of such materials, argue defendants, the trial court deprived defendants of alternative bases supporting their motion to dismiss.

Rule 201 of the North Carolina Rules of Evidence governs judicial notice of adjudicative facts. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2001). Rule 201 does not address, however, judicial notice of legislative facts. *See id.*, commentary. Adjudicative facts are those involving the immediate parties, including "who did what, where, when, how, and with what motive or intent." *Id.*, commentary. "Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* Legal conclusions are not the proper subject of judicial notice. *See Glenn- Robinson v. Acker*, 140 N.C. App. 606,

634, 538 S.E.2d 601, 620 (2000), *disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001).

In the instant case, defendants assert that, had the trial court taken judicial notice of the order of the Board of Elections, such order would have provided an unconditional affirmative defense to plaintiffs' claims. Specifically, defendants contend that the Board's order conclusively establishes that (1) defendants acted in good faith in publishing the advertisement and (2) the statements in the advertisement were true. We disagree.

The Board concluded that defendant's political advertisement did not "constitute criminal election activity under GS § 163-274(8)." As noted above, legal conclusions are legislative facts, and as such, are not properly subject to judicial notice under Rule 201. The trial court therefore correctly declined to take judicial notice of the Board's conclusion that plaintiffs did not violate section 163-274(8). Further, contrary to defendants' assertions, none of the Board's findings conclusively establishes an affirmative defense to plaintiffs' claims. Thus, even if judicial notice were proper, the Board's order, concluding that defendants did not commit criminal election activity, would not constitute an absolute bar to plaintiffs' tort claims against defendants. For example, the Board did not specifically find that defendants acted in good faith in publishing their advertisement. Rather, the Board found that defendants "asserted to the Board" that they acted in good faith. Similarly, the Board found that plaintiffs asserted that defendants acted "intentionally or recklessly." The Board's mere recital of arguments made by the parties before the Board does not resolve the issue of defendants' good faith such as to form the basis for collateral estoppel--it simply establishes that the parties made such arguments.

The Board's findings likewise fail to conclusively establish that defendants' advertisement, in its entirety, was

true. The Board found that, during the election campaign for the Office of Attorney General, " R. Daniel Boyce and others on his behalf had asserted that he was involved in all the tax cases that involved the Boyce family lawyers." The Board therefore concluded that, "[i]n view of R. Daniel Boyce's own campaign use of all the tax cases handled both by himself, G. Eugene Boyce, and other Boyce family members as positive campaign material[,]" defendants committed no illegal campaign activity. These findings by the Board suggest that it decided the case based on principles of fairness and estoppel rather than on the actual truth or falsity of the claims made in defendants' advertisement. Such findings and conclusions do not establish that all of the statements in defendants' advertisement were true. For example, plaintiffs alleged in their complaint that the Boyce & Isley law firm did not exist in 1997 and therefore could not have litigated the tax case for which, according to defendants' advertisement, it charged a fee of $28,000.00 per hour. Nothing in the Board's order addressed the existence or non-existence of the Boyce & Isley law firm. In fact, nothing in the Board's findings established that R. Daniel Boyce had litigated the tax case, only that he had asserted in his campaign materials that "he was involved" in such. Because the Board's findings do not conclusively establish that the statements in defendants' advertisement were true, such findings cannot serve as the basis for an absolute defense to plaintiffs' claims. We hold that the trial court did not err in declining to take judicial notice of the order by the Board of Elections.

We also conclude that the trial court did not err in refusing to take judicial notice of various newspaper articles submitted by defendants, none of which was relevant to testing the legal sufficiency of plaintiffs' complaint or provided the basis for a complete defense to plaintiffs' claims. We therefore overrule defendants' assignment of error.

In conclusion, plaintiffs' complaint presented a sufficient claim upon which relief could be granted for defamation and unfair and deceptive trade practices at the Rule 12(b)(6) stage. We therefore hold that the trial court erred in dismissing plaintiffs' complaint pursuant to Rule 12(b)(6). We further hold that the trial court did not err in declining to take judicial notice of extraneous matters. The order of the trial court is therefore

Affirmed in part and reversed in part.

Judges GREENE and McGEE, concur.

APPENDIX C

No. COA01-880

North Carolina Court of Appeals

****

BOYCE & ISLEY, PLLC, Eugene Boyce, R. Daniel Boyce, Philip R. Isley, and Laura B. Isley, Plaintiffs,

v.

Roy A. COOPER, III, The Cooper Committee, Julia White, Stephen Bryant, and Kristi Hyman, Defendants.

****

ORDER

The following order was entered:

The petition filed in this cause on the 22nd day of October 2002 and designated "Defendant-Appellees' Petition for Rehearing" is Denied.

By order of the Court this the 12th day of November 2002.

The above order is therefore certified to the Clerk of the Superior Court Wake County.

Witness my hand and official seal this the 12th day of November 2002.

/s/ John H. Connell
John H. Connell
Clerk of North Carolina Court of Appeals

APPENDIX D

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION 00 CVS 12776

BOYCE & ISLEY, PLLC, EUGENE BOYCE, R. DANIEL BOYCE, PHILIP R. ISLEY, and LAURA B. ISLEY,

Plaintiffs,

vs.

ROY A. COOPER, III, THE COOPER COMMITTEE, JULIA WHITE, STEPHEN BRYANT, and KRISTI HYMAN,

Defendants.

ORDER
[RULE 12(B)(6)]

THIS CAUSE coming on to be heard and being heard by the undersigned judge of the Superior Court presiding at the February 12, 2001 Civil Session of the Superior Court of Judicial District 10 on the defendants' Rule 12(b)(6) Motion to Dismiss and the Court having previously ruled that it would restrict its consideration, in testing the sufficiency of the allegations of plaintiffs' complaint, to those matters and things contained therein or attached thereto, and it appearing to the Court that, taking the allegations of the complaint as true for the purpose of testing their sufficiency, defendants' motion should be allowed and the complaint should be dismissed for its failure to state a claim upon which relief can be granted;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that defendants' Motion to Dismiss be, and it is hereby ALLOWED and that plaintiffs' complaint, and each purported claim therein be, and it is hereby dismissed with prejudice;

IT IS FURTHER ORDERED that each party shall bear his, her or its own costs.

This the 4th day of April, 2001.

/s/ James C. Spencer, Jr.
James C. Spencer, Jr.
Superior Court Judge Presiding

APPENDIX E

BEFORE THE STATE BOARD OF ELECTIONS

NORTH CAROLINA
WAKE COUNTY

IN THE MATTER OF THE COMPLAINT OF BOYCE AND ISLEY, PLLC OF NOVEMBER 2, 2000

Boyce and Isley, PLLC, G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley, and Laura Boyce Isley,

Petitioners

ORDER OF THE STATE BOARD OF ELECTIONS

THIS MATTER WAS HEARD at the November 28, 2000,meeting of the State Board of Elections. State Board members in attendance at the hearing were Chairman Larry Leake (D), Secretary June Youngblood (R), Dorothy Presser (R), Dawn Baxter (D), and Rose Vaughn Williams (D).

This hearing was called after the State Board received a complaint, about a television advertisement, from the above petitioners alleging a violation GS §i 63-274(8) by the campaign of Roy Cooper, Democratic nominee for Attorney General of North Carolina. The basis of the allegation was that the ad was false as to content as it pertained to R. Daniel Boyce, Republican Nominee. for North Carolina Attorney General and his law firm Boyce and Isley, PLLC.

Attorney Philip Isley, Attorney G. Eugene Boyce and Attorney Laura Boyce Isley represented themselves and the other petitioners. Attorney Jim W. Phillips Jr. and Attorney Alan Duncan represented the respondent, the Roy Cooper Campaign.

The State Board, after reviewing and considering the

petition and materials submitted to the Board before and during the hearing, including viewing the alleged false advertisement; finds and concludes, unanimously, as follows:

FINDINGS

1. The basis of the allegation of false content was an assertion in the television ad by the respondent that R. Daniel Boyce was an attorney in a case called Smith Class A which was a class action of protesting taxpayers suing to obtain a refund of the NC intangibles tax. This action was settled with Womble Caryle and petitioner R. Eugene Boyce representing the plaintiffs. Those attorneys made an initial request for 23 million dollars in attorney fees from the settlement proceeds from the presiding judge, Howard E. Manning. Judge Manning denied the request and awarded $1,691,000 in attorney fees.

2. In his order as to attorney fees, Judge Manning criticized the request of 23 million as amounting to a fee of $28.000 an hour, which the judge noted, was in excess or a policeman's yearly salary. The judge stated the request for 23 million dollars "shocked the conscience"

3. The television ad of Roy Cooper stated that R. Daniel Boyce and his law fine sued the state in the Smith Class A case and was a part of a shocking request of 23 million dollars in attorney fees. The ad also stated that the $28,000 an hour requested was in excess of a teacher's annual salary. The petitioners claimed this content was false and was made intentionally or recklessly by the Cooper Campaign in violation of GS § 163 274(8).

4. However, it was shown by the respondent that from the early days of his campaign to the end, candidate R. Daniel Boyce and others on his behalf had asserted that he was involved in all the tax cases that involved the Boyce family lawyers. The Boyce family lawyers and law firm had

handled several, tax refund cases, with R. Daniel Boyce being an attorney of record only in the most recent case. However, in a least one radio interview, R. Daniel Boyce claimed he was helping and advising his father, G. Eugene Boyce in all of the "tax cases". R. Daniel Boyce also was quoted in an article from the Raleigh News and Observer that he had helped his father on the "intangibles tax cases, working on the cases, but not billing. He stated, "We've been fighting for the people to get the money back". Until the Cooper Campaign used the negative aspect of the 23 million dollar attorney fee request in the first tax case, R. Daniel Boyce used the Boyce family tax cases as a positive campaign issue. He associated himself with all the cases even thought he was not counsel of record in all of the cases.

5. The Cooper campaign asserted to the Board that it relied upon the Boyce campaign's numerous efforts to associate the candidate Boyce with all the tax cases handled by the Boyce family lawyers as a good faith basis in using the 23 million dollar attorney fee in advertising associating R. Daniel Boyce with said fee request.

6. In view of R. Daniel Boyce's own campaign use of all the tax cases handled both by himself, G. Eugene Boyce, and other Boyce family members as positive campaign material, the use of one particular aspect of the Smith Class A tax case by the Roy Cooper Campaign does not constitute criminal election activity under GS § 163-274 (8). Nor does such action appear to violate any other criminal or civil election law, rules, of regulations.

CONCLUSION

1. The action of the Roy Cooper Campaign in using the 23 million dollar fee request in a political advertisement critical of R. Daniel Boyce and the law firm of Boyce and Isley PLLC is not a violation of G.S. § 163-274 or any other election law or regulation of North Carolina.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. The relief requested by the petitioners in their November 2, 2000 complaint is denied and the complaint is dismissed.

This the 20th day of December 2000.

FOR THE STATE BOARD OF ELECTIONS

/s/ Larry Leake
LARRY LEAKE, CHAIRMAN

/s/ Gary O. Bartlett
GARY O. BARTLETT,
EXECUTIVE SECRETARY-
DIRECTOR

APPENDIX F

NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 00 CVS 12776
BOYCE & ISLEY, PLLC, EUGENE BOYCE, R. DANIEL BOYCE, PHILIP R. ISLEY and LAURA B. ISLEY, Plaintiffs, v. ROY A. COOPER, III, THE COOPER COMMITTEE, JULIA WHITE, STEPHEN BRYANT, and KRISTI HYMAN, Defendants.	COMPLAINT (Along with attached discovery) (Jury Trial Demanded)

NOW COME the Plaintiffs and complaining of the Defendants, allege and say as follows:

1. Boyce & Isley, PLLC (hereinafter referred to as the "law firm") is a professional limited liability company organized and existing under the laws of the State of North Carolina, with its principal place of business in Wake County, North Carolina. The law firm is comprised of four attorney members, Eugene Boyce, R. Daniel Boyce, Philip R. Isley and Laura Boyce Isley. The law firm was formed in May 1999. On July 8, 1999, the articles of organization were

filed with the North Carolina Secretary of State. The law firm is rated AV, the highest recognized rating of law firms.

2. Eugene Boyce is a citizen and resident of Wake County, North Carolina. Eugene Boyce is a North Carolina attorney, licensed to practice in all trial and appellate courts of the State of North Carolina. In addition, he is licensed to practice in several United States District Courts, Circuit. Courts of Appeals and in the Supreme Court of the United States. Eugene Boyce has practiced law for over 40 years in all areas of civil and criminal trial practice, including class actions, commercial law and constitutional law.

3. R. Daniel Boyce (hereinafter referred to as "Dan Boyce") is a citizen and resident of Wake County, North Carolina. Dan Boyce is a North Carolina attorney, licensed to practice in all trial and appellate courts of the State of North Carolina. In addition, he is licensed to practice in several United States District Courts, the Fourth Circuit Court of Appeals and the Supreme Court of the United States. Dan Boyce has practiced law for 16 years. For almost seven years, Dan Boyce served as Assistant United States Attorney (federal prosecutor) in the Eastern District of North Carolina. He has also practiced in all areas of civil and criminal trial practice including class actions. Dan Boyce is a Board Certified Specialist in federal and state criminal law.

4. Philip R Isley is a citizen and resident of Wake County, North Carolina, Philip R. Isley is licensed to practice in all trial and appellate courts of the State of North Carolina. In addition, he is licensed to practice in the United States District Court for the Eastern District of North Carolina and the United States Fourth Circuit Court of Appeals. Philip R. Isley has practiced law for 8 years in all areas of civil trial practice including class actions, commercial law, employment law and constitutional law.

5. Laura Boyce Isley is a citizen and resident of

Wake County, North Carolina. She is licensed to practice in all trial and appellate courts of the State of North Carolina. Laura Boyce Isley has practiced law for 8 years including six years as a law clerk and staff attorney for the Supreme Court of North Carolina and the North Carolina Court of Appeals.

6. Roy A. Cooper, III (hereinafter referred tows "Mr. Cooper") is a citizen and resident of Nash County, North Carolina. Upon information and belief, Mr. Cooper is licensed to practice law in North Carolina. Mr. Cooper, for the past 14 years, has been a member of the North Carolina House and Senate. Since 1999, Mr. Cooper was the Senate Majority Leader for the North Carolina Senate. Upon information and belief, he is an AV rated attorney.

7. Upon information and belief, the defendant, "The Cooper Committee" is an unincorporated association with its principal place of business in Wake County, North Carolina. It was formed solely to manage, supervise and support defendant Cooper's candidacy for the North Carolina Attorney General's office. Upon information and belief, defendant Cooper is a member o f the Cooper Committee.

8. Upon information and belief, defendant Julia White is a salaried employee and agent of The Cooper Committee. In addition, defendant White served as Communications and Research director for The Cooper Committee. She is a citizen and resident of Orange County, North Carolina.

9. Upon information and belief, defendant Steven Bryant is a salaried employee and agent of The Cooper Committee. In addition, defendant Bryant served as Campaign Manager for The Cooper Committee. He is a citizen and resident of Wake County, North Carolina.

10. Upon information and belief, defendant Kristi Hyman is a salaried employee of The Cooper Committee. In addition, Kristi Hyman served as Field Director for The

Cooper Committee. She is a citizen and resident of Durham County, North Carolina.

11. Boyce & Isley, PLLC and its member attorneys have earned a statewide reputation of professionalism, honesty, integrity, and success in representing North Carolina citizens and taxpayers. From the time of and after its formation in May 1999, Boyce & Isley, PLLC and its four member attorneys participated in, and Eugene Boyce continued to participate in, the Bailey/Emory/Patton settlement administration (including appeals), the Smith/Shaver intangibles tax case (non-protestor case), and the Latta tobacco case, among others. The three named cases provided Boyce & Isley, PLLC and its member attorneys with a favorable reputation among citizens, taxpayers, attorneys and litigants throughout North Carolina.

12. Beginning on or about October 31, 2000, defendant Cooper, a licensed North Carolina attorney and officer of the court, in his capacity as the Democrat nominee candidate for the Office of North Carolina Attorney General, published and caused to be circulated by commercial television and other means derogatory reports, with reference to Dan Boyce, the Republican nominee candidate for the Office of North Carolina Attorney General, authorized a television advertisement (hereafter "the negative attack ad") that contained oral and visual reports and statements in the words and form as appears and as described substantially as follows:

Audio	Visual
[Voice:] "I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad."	*Color video of Mr. Cooper*

<table>
<tr><td rowspan="5">[Voice Over:]
"Roy Cooper, endorsed by every major police organization for his record of tougher laws."</td><td colspan="2">Color video of Mr. Cooper and Law Enforcement Officers marching.</td></tr>
<tr><td colspan="2">ENDORSED BY EVERY MAJOR POLICE ORGANIZATION ROY COOPER</td></tr>
<tr><td rowspan="4">"Dan Boyce – his law firm sued the state,
charging $28,000 an hour in lawyer fees
to the taxpayers."</td><td>SUED THE STATE</td><td>Black and Gray Photo of Dan Boyce</td></tr>
<tr><td colspan="2">Flips four pages of Nov. 1997 Court Order in Case no. 95 CVS 6715</td></tr>
<tr><td colspan="2">CHARGED $28,000/HOUR TO TAXPAYERS</td></tr>
<tr><td colspan="2">SOURCE: SUPERIOR COURT OF N.C. CASE NO. 95 CVS 6715</td></tr>
<tr><td>"The Judge said it shocks the conscience."</td><td colspan="2">IT SHOCKS THE CONSCIENCE</td></tr>
<tr><td>"Dan Boyce's law firm wanted more than a police officer's salary for each hour's work."</td><td colspan="2">MORE THAN A POLICE OFFICER'S SALARY</td></tr>
<tr><td>"Dan Boyce, wrong for Attorney general."</td><td colspan="2">DAN BOYCE
WRONG FOR ATTORNEY GENERAL</td></tr>
</table>

13. Defendant Cooper specifically reports in his negative attack ad that his "source," authority and justification for truthfulness is "Superior Court of NC, Case No. 95 CVS 6715."

14. The purported oral and visual quotes of "the Judge" are reported to be taken literally and as edited from

the "Memorandum and Order" of Superior Court Judge Howard E. Manning, Jr. entered November 20, 1997 in Case No. 95 CVS 6715. The Order relates solely to the case of protesting taxpayers known to the public in general, to defendant Cooper and to other defendants as the Smith A class members.

15. Defendant Cooper, as a member of the North Carolina Senate in April 1999, was the sponsor of Senate Bill 881, commonly known as the "Stand by your ad" statute. Defendant Cooper, according to law and by his personal audio and visual pronouncement in the negative attack ad, "stood by his ad" as a matter of law by informing all that viewed the negative attack ad that "I sponsored this ad."

16. Upon information and belief, prior to publication of the negative attack ad, Defendant Cooper and all defendants were aware of the relevant contents of Judge Manning's November 1997 Order.

17. Upon information and belief, prior to publication of the negative attack ad, Defendant Cooper and all defendants, were aware as a matter of law that the public records of the State of North Carolina showed candidate "Dan Boyce's law firm" was not in existence in November 1997 and was not formed until May 1999.

18. Numerous portions of the spoken and written words contained in the negative attack ad are false and were published and caused to be circulated in reckless disregard of their truth or falsity.

19. Law firms involved in the Smith A (protestor) case were Womble, Carlyle, Sandridge & Rice, PLLC, a Eugene Boyce, partner in Womble Carlyle through September 1996 and thereafter a sole practitioner from October 1996 through April 1999. A copy of a summary of the case by Superior Court Judge Howard E. Manning, Jr.

prepared November 2, 2000, is attached hereto as Exhibit "A" and incorporated herein by reference.

20. The Defendants conspired and acted in concert to publish knowingly false words defaming Boyce & Isley, PLLC, the member attorneys of Boyce & Isley, PLLC and Dan Boyce, as candidate for the position of North Carolina Attorney General. Said spoken and written words intentionally placed in the negative attack ad were known by Defendants to be false and defamatory at the time they were made, and were made with reckless disregard for whether they were true of false.

21. In publishing the spoken and written words of the negative attack ad, the Defendants acted with actual malice toward Boyce & Isley, PLLC, the member attorneys of Boyce & Isley, PLLC and Dan Boyce, as candidate for the position of North Carolina Attorney General.

22. The Defendants in their negative attack ad conveyed directly and by innuendo to the public over commercial television and commercial radio that the law firm of Boyce & Isley, PLLC and its member attorneys in Case No. 95 CVS 6715, violated the Rules of Professional. Responsibility in that "Dan Boyce's law firm" unethically and unscrupulous "charged" or was "charging" every taxpayer in North Carolina $28,000.00 per hour in lawyer fees in a lawsuit that "Dan Boyce's law firm" was currently handling or had handled.

23. The spoken and the written words of the negative attack ad are libelous per se and slanderous per se, in that the words disparage Boyce & Isley, PLLC and its member attorneys' professional reputation and honesty in billing clients, and states that they engage in unethical conduct.

24. The spoken and written words of the negative attack ad were published by Defendant Cooper and other Defendants out of spite, personal ill-will, and personal,

actual malice toward Boyce & Isley, PLLC and its member attorneys with the intention of damaging their professional, business and personal reputations. Defendants through their negative attack ad intended to defame, injure, belittle and disparage Plaintiffs by depriving them of the respect, confidence and esteem essential to Plaintiffs' professional status in commerce and the business community. Defendants through their negative attack ad intended to deprive Plaintiffs of their good names, reputations and esteem of Their clients, professional associates, friends and acquaintances, and to hold Plaintiffs up to public scorn, contempt, ridicule and disgrace.

25. Upon information and belief, prior to publishing the written and spoken words of the negative attack ad, the Defendants, or agents thereof, possessed polling research that indicated Dan Boyce was leading Defendant Cooper in the campaign for the position of North Carolina Attorney General.

26. The spoken and written words of the negative attack ad were calculated and intended to affect the chances of Dan Boyce as a candidate. for election to the Office of Attorney General. The spoken and written words were also published by Defendant Cooper and the other Defendants with knowledge of their falsity, and in reckless disregard for whether they were true or false. The Defendants published the spoken and written words out of spite, personal ill-will, and personal, actual malice toward Dan Boyce as candidate for North Carolina Attorney General with the intention of damaging Dan Boyce's personal reputation, and with the intention to injure Dan Boyce by depriving him of the respect, confidence and esteem essential to his candidacy for Attorney General, and with the intention to deprive Dan Boyce of his good name, reputation and the esteem of the voters, professional associates, friends and acquaintances, and to hold Dan Boyce and members of his law firm up to

public scorn, contempt, ridicule and disgrace.

27. Upon information and belief, the written and spoken words of the negative attack ad were published by the Defendants on broadcast and commercial cable television channels throughout North Carolina and portions of Virginia and South Carolina, beginning on October 31, 2000 and continuing through November 7, 2000. Upon information and belief, well over 1 million people saw, read and heard the written and spoken words of the negative attack ad published by the Defendants.

28. In an effort to stop the libelous and slanderous words of the negative attack ad then being published by the Defendants, detailed letters were sent to Defendants informing them of the true facts and of the falsity of their political ad. In addition, upon information and belief, the Defendants received Exhibit "A" from a newspaper journalist relating to the negative attack ad. Each letter sent by the Plaintiffs to the Defendants demanded a retraction of the negative attack ad and an apology. Copies of the letters sent to the Defendants are attached hereto as Exhibit "B" and incorporated herein by reference.

29. Defendants received the letters dated November 2, 2000 and November 6, 2000, respectively.

30. Defendants had ample opportunity and time to retract their known false and negative attack ad and could have continued to publish the ad as originally produced prior to October 31, 2000 with lawful and truthful content.

31. Defendants never retracted their knowingly false negative attack ad.

32. As a result of Defendants' malicious publication of libelous and slanderous words in their negative attack ad, the Plaintiffs have suffered damages to their names and professional and business reputation. The Plaintiffs also suffer damage by spending time and resources to correct the

libelous and slanderous words of the negative attack ad and the damage done to their professional reputation in the community and the State.

33. Defendants never responded to the Plaintiffs' demands to retract the negative attack ad until late in the afternoon of November 6, 2000, and even then refused to recant.

34. The Plaintiffs have satisfied all conditions precedent necessary to bring the instant action.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment Declaring Defendants Violation of N.C.G.S. §163-274 *et seq.*)

35. The allegations of Paragraphs 1 through 34 are incorporated herein by reference.

36. The actions of the Defendants as heretofore alleged constitute violations of the election laws of the State of North Carolina, specifically N.C.G.S. §163-274 (8) that provides inter alia that it is unlawful:

> [f]or any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.

37. The Plaintiffs are entitled to judgment declaring that the Defendants violated N.C.G.S. §163-274 (8).

SECOND CLAIM FOR RELIEF
(Conspiracy to Violate Plaintiffs' Rights Under N.C.G.S. §163-274 *et seq.*)

38. The allegations of Paragraphs 1 through 37 are incorporated herein by reference.

39. The Defendants conspired and, in concert, agreed to engage in unlawful conduct that violated Plaintiffs' legal rights, the rights of all citizens and that is against the public policy of the State of North Carolina for a fair and honest election of persons to serve as public officers of the State. Moreover, the Defendants have acted in furtherance of such conspiracy by participating in or assisting in the publication of the false negative ad and the unjustified refusal to retract the ad when notified of the true facts.

40. The Plaintiffs have suffered damages, proximately caused by the Defendants, in an amount to be proved during the trial of this matter.

THIRD CLAIM FOR RELIEF
(Libel *Per Se*)

41. The allegations of Paragraphs 1 through 40 are incorporated herein by reference.

42. The words published by Defendants by means of commercial television defamed and libeled the individual Plaintiffs and their law firm in the practice of their profession and means of livelihood.

43. The Plaintiffs have suffered damages, proximately caused by the Defendants, in an amount to be proved during the trial of this matter.

44. The actions of the Defendants also entitle the Plaintiffs to an award of punitive damages as allowed by law.

FOURTH CLAIM FOR RELIEF
(Slander *Per Se*)

45. The allegations of Paragraphs I through 44 are incorporated herein by reference.

46. The words uttered and caused to be uttered by Defendants by means of commercial television defamed and slandered the individual Plaintiffs and their law firm in the practice of their profession and means of livelihood.

47. The Plaintiffs have suffered damages, proximately caused by the Defendants, in an amount to be proved during the trial of this matter.

48. The actions of the Defendants also entitle the Plaintiffs to an award of punitive damages as allowed by law.

ALTERNATIVE FIFTH CLAIM FOR RELIEF
(Unfair and Deceptive Trade Practices: if Libel/Slander *Per Se* claims are successful)

49. The allegations of Paragraphs 1 through 48 are incorporated herein by reference.

50. The actions of Defendants as hereinbefore alleged were done in the course and scope of commercial activity in the State of North Carolina. Defendants' actions were done in bad faith, were unethical, were unfair to the Plaintiffs, were deceptive to the public and were intended to harm their political opponent, Dan Boyce, and his law firm and its members, the Plaintiffs herein.

51. The Plaintiffs have suffered damages as a proximate result of the Defendants actions.

WHEREFORE, Plaintiffs demand judgment as follows against the Defendants:

1. That the Court enter judgment declaring that the conduct of Defendants is in violation of N.C.G.S. Article 22

of Chapter 163 and the public policy of the State of North Carolina.

2. That Plaintiffs have and recover against the Defendants, jointly and severally, such monetary relief, injunctive relief; and equitable relief to which Plaintiffs may be entitled.

3. That Plaintiffs have and recover punitive damages against the Defendants, jointly and severally.

4. In the alternative, that Plaintiffs have and recover treble damages, attorneys fees and such relief as provided by N.C.G.S. §75-1, *et seq.* against the Defendants, jointly and severally.

5. For such other and further relief as may be deemed appropriate by this Court.

6. For a trial by jury on all issues so triable.

This the 22nd day of November, 2000.

Boyce & Isley, PLLC.

/s/ G. Eugene Boyce
G. Eugene Boyce, *Pro Se*

/s/ R Daniel Boyce
R. Daniel Boyce, *Pro Se*

/s/ Phillip R. Isley
Philip R. Isley, *Pro Se*

/s/ Laura B. Isley//RDB
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Post Office Box 1990
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APPENDIX G

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the North Carolina General Statutes are as follows:

§ 75-1-1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

§ 75-16. Civil action by person injured; treble damages.

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right

of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.

§ 75-16.1. Attorney fee.

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

Supreme Court U.S.
FILED
SEP 15 2003
OFFICE OF THE CLERK

No. 03-176

In The Supreme Court of the United States

ROY A. COOPER, III, *et al.*,

Petitioners,

v.

R. DANIEL BOYCE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

QUESTION PRESENTED

Respondents Boyce & Isley, PLLC and its four attorneys filed the instant action against Petitioners based on Petitioners' campaign advertisements in the North Carolina Attorney General's race that defamed Respondent Boyce & Isley, PLLC and its member attorneys. The trial court dismissed the Complaint pursuant to Rule 12(b)(6). The North Carolina Court of Appeals reversed, holding that the well-pleaded allegations of the Complaint (admitted by Petitioners) state valid causes of action for libel and slander *per se* and unfair and deceptive trade practices. The North Carolina Court of Appeals' opinion is consistent with the First Amendment, in that Petitioners intentionally lied about Respondents' law firm and its members. The Supreme Court of North Carolina denied review and remanded to the trail court. Discovery proceedings are now under way. Therefore, the proceedings below should not be disturbed.

PARTIES TO THE PROCEEDING

Respondents to this case are Boyce & Isley, PLLC, Eugene Boyce, R. Daniel Boyce, Philip Isley and Laura B. Isley. Petitioners are Roy A. Cooper, III, the Cooper Committee, Julia White, Stephen Bryant and Kristi Hyman.

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PERCEIVED MISSTATEMENT OF FACTS IN PETITION

This case is in the earliest, interlocutory stage of a civil proceeding. Answer to the Complaint was only recently filed on 22 May 2003. Petitioners' Interrogatory responses and responses to Requests for Admissions were submitted on 29 August 2003. The trial court has ordered production of documents for 23 September 2003. Respondents will begin oral depositions just a few days later. A request is pending for jury trial in early to mid 2004.

Petitioners' caption, though appropriately reversing the parties, is misleading in that it does not state the actual caption as pleaded in the Complaint.[1] Moreover, it appears designed to convey to this Court an inaccurate introduction, *i.e.*, that this action is only between two political opponents. The true gravamen of the Complaint is Petitioners' defamatory statements toward Respondents Eugene Boyce, Philip R. Isley, Laura B. Isley, and their law firm, Respondent Boyce & Isley, PLLC. Petitioners made a late-hour, desperate campaign commercial attacking their opponent Respondent Dan Boyce (the television commercial at issue is hereinafter referred to as the "attack ad"). The real injury was not what candidate Roy Cooper said about candidate Dan Boyce, but was Petitioners' outright misrepresentations that a law firm and its members charge gross and unethical fees to the taxpayers of North Carolina. It was Respondent Dan Boyce who was

[1] The caption of the Complaint reads: "Boyce & Isley, PLLC, Eugene Boyce, R. Daniel Boyce, Philip R. Isley, Laura B. Isley v. Roy A. Cooper, III, The Cooper Committee, Julia White, Stephen Bryant and Kristi Hyman."

the Republican candidate and political opponent in the 2000 election for the office of Attorney General. Neither Eugene Boyce, Philip R. Isley, Laura B. Isley nor Boyce & Isley, PLLC was the political opponent of Petitioner Cooper.

In addition, Petitioners cleverly seek to divert the Courts' attention by omitting the actual defamatory language from their Statement of Facts that is the crux of this matter. (See Petitioners' statement of the "relevant part" (Pet. 3) and compare it with the true text of the attack ad viewed by over one million people in three States. (Pet. App. 33a).

There is no final judgment in this case. The only facts before the state courts, which are, or at least should be, the only relevant facts in this Court, are the material and well-pleaded allegations of the Complaint. (Pet. App. 29a-41a). Petitioners themselves, as defendants in state court, elected to challenge the sufficiency of Respondents' Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure (failure to state a claim upon which relief can be granted). In making that strategic election to seek dismissal at the earliest stage of the litigation, Petitioners admit the truth of each well-pleaded factual allegation of the Complaint. *Jackson v. Carolina Hardwoods Co.*, 120 N.C. App. 870, 463 S.E.2d 571 (1995). Thus, this Court should only look to the Complaint and the three exhibits attached to the Complaint, *i.e.*, the 2 November 2000 Memorandum from the Honorable Howard E. Manning, Jr., the Letter to Roy Cooper dated 2 November 2000, and the Letter to Roy Cooper dated 6 November 2000. Interestingly, Petitioners chose not to include the exhibits attached to the Complaint in their Petition. Respondents, mindful of their obligations to this

Court to provide a fair and full representation of the facts, have attached the exhibits to the Complaint in their Appendix.

After reviewing the Complaint and the exhibits attached to the Complaint, both appellate courts of North Carolina have effectively stated that the Complaint states valid claims for relief in behalf of the law firm and its members for libel *per se* and unfair trade practices. (Pet. App. 1a, 14a).

Since this Honorable Court has used the phrase "a known lie"[2] in analyzing libel cases, the Respondents will also depart from their customary more polite and preferred verbiage and call Petitioners' attack ad just what it is – a known lie.

In addition to rearranging plaintiffs' names and misstating the libelous statements of their attack ad, Petitioners go even further to add copious new and additional facts beyond those to which responses to Rule 12(b)(6) motions are restricted. Additional facts were appropriately not considered in the interlocutory state court decisions now complained of and are inappropriate for a Petition in this Court. Petitioners ask this Court to review a case wholly different from the facts before the state courts.

Petitioners attempt to "improve" the facts of Respondents' Complaint by alleging numerous outside-the-record and contested facts that may or may not be presented to a March 2004 jury trial next year. (Pet. 3, 13, 19 and Pet.

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[2] *Garrison v. Louisiana*, 374 U.S. 64 (1964).

App. 25a-28a). Rules of this Court mandate that Petitioners tell this Court those facts which the three state courts below considered and relied on – not those facts Petitioners hope may be heard at trial. Granting or denying review in this Court should be based only on the factual and legal basis applied by the state courts. The facts stated in the Complaint and its exhibits, are for present purposes in this Court, as was the case in state court below, the *only* facts pertinent for consideration.

RESPONDENTS' STATEMENT OF FACTS

What Petitioners said and did between 31 October 2000 through 7 November 2000 (Election Day) is relatively simple. Petitioner Cooper, his campaign and campaign staff, Petitioner Cooper's fellow defendants, chose to publish day and night for eight days throughout North Carolina and parts of Virginia and South Carolina, false statements cloaked in a television commercial claiming the five Respondents, including their one political opponent, engaged in unethical and unprofessional activities. (Pet. App. 29a-43a). In their attack ad, Petitioners charge that the five Respondents engaged in violations of the North Carolina Rules of Professional Responsibility, in that Petitioners intentionally and falsely citing a *specific* lawsuit by *specific* case number and quoting the *specific* Judge and part of a *specific* court order in that case. (Pet. App. 32a-35a).

Based upon the jurisprudence of this Court, *even a politician* should not cross the threshold of publishing known and deliberate lies against his opponent, especially when third party, non-candidates are the target of the lies.

"Admitted facts" set forth in the Complaint that are pertinent to the Petition (facts admitted for the purpose of determining whether a valid claim for relief is stated) and that are the facts upon which the state courts relied, include the following:

1. Petitioners were involved in a contested election against their opponent, Respondent Dan Boyce. Petitioners possessed polling research that indicated Respondent Dan Boyce was leading Petitioner Cooper in the campaign for the position of North Carolina Attorney General. (Pet. App. 36a).

2. In response to this polling research, eight days before the 7 November 2000 election, Petitioners produced and published statewide a television attack ad attacking their opponent, Respondent Dan Boyce. The ad contained four untrue statements of fact, attacking not only Respondent Dan Boyce, but also members of their opponents' law firm, particularly Respondents Philip and Laura Isley (neither of whom were running for any political office), saying in part:

> **"Dan Boyce – his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers."**
>
> **The source quoted was "Superior Court of N.C. Case No. 95 CVS 6715."**
>
> **"The [Superior Court] Judge said it shocks the conscience."** ("It" being charging clients a fee of $28,000 per hour.)
>
> **Dan Boyce's "law firm wanted more than a police officer's salary for each hour's work."**

(Pet. App. 33a).

3. Respondent law firm was not formed until May, 1999. (Pet. App. 32a). The law firm was not involved in the case cited by court docket number in Petitioners' ads. (Pet. App. 34a). Nor were the candidate and two of other members involved and could not be persons referred in the Judge's quote. Only the candidate's father and a different law firm were. During the days and nights the false statements were still being published, the Judge quoted in the attack ad made available to Petitioners *before the election* and to the media his written statement confirming who the law firm and lawyer referred to in his Order were. (Pet. App. 34a-35a, Resp. App. 1-3). The Judge identified as counsel for taxpayer clients the law firm Womble Carlyle Sandridge & Rice and a sole practitioner, Eugene Boyce. Eugene Boyce, father and father-in-law of the other three Respondents here, years later became a member in Respondent Boyce & Isley, PLLC. *Id.*

4. Respondent Philip R. Isley immediately notified Petitioners of the false portions of the ad. (Resp. App. 3-11). In Respondent Philip R. Isley's letter dated 2 November 2000, Petitioners were told that the attack ad they were televising contained false information about himself and his fellow Respondents. Respondent Philip R. Isley demanded an immediate retraction and an apology. (Resp. App. 3-7). Petitioners did not respond to either the 2 November 2000 letter or the written statement by the Judge but continued publication of the attack ad. A second letter dated 6 November 2000 demanded retraction. (Resp. App. 7-11). After hearing no valid response from Petitioners, Plaintiffs filed this civil action for damages in Wake

County Superior Court on 6 November 2000,[3] the day before the election and before the outcome of the election could be known.

5. Knowingly false statements impugned the professional reputation of Respondents. They were false and defamatory as to persons other than the political opponent – the law firm and its three attorneys that were neither public figures nor political candidates. In order to connect one lawyer who was their political opponent, Petitioners had to lie about a prior lawsuit, lie about the content and context of a Judge's order, lie about the firm's billing practices and lie about the good reputation of Respondent attorneys and their law firm. Three of the lawyers lied about, Respondents Philip and Laura Isley and Respondent Dan Boyce, in addition to Respondent Boyce & Isley, PLLC, had absolutely no connection whatever to Superior Court case 95 CVS 6715 cited in the attack ad, never represented the taxpayer clients cited in the attack ad, were not referred to by the Judge quoted in the attack ad and did not and never have engaged in unethical billing practices. Nor has Respondent Eugene Boyce engaged in unethical, avaricious, and unscrupulous billing of his clients. (Pet. App. 29a-43a).

6. Petitioners' deliberate falsehoods throughout North Carolina and in parts of two neighboring states defamed all five Respondents by claiming the law firm and its lawyers are guilty of unethical billing practices – that

[3] Petitioners continually misrepresent the date in which this lawsuit was filed. Contrary to the assertions in the Petition, this lawsuit was filed on 6 November 2000, by the filing of a Rule 3 Complaint.

they had charged clients at the rate of $28,000 an hour, indisputably a violation of Rule 1.5, N.C. Rules of Professional Conduct. The defamatory ads also charged that Respondents were "charging $28,000 an hour in lawyers' fees to the taxpayers" and "more than a police officer's salary" in Case No. 95 CVS 6715. (Pet. App. 29a-43a).

7. Respondents Boyce & Isley, PLLC, Eugene Boyce, Philip R. Isley and Laura B. Isley were not at the time "public figures." Respondent Dan Boyce, the opposing candidate, on the other hand was a public figure. Standards of proof and legal principles differ as among the five Respondent plaintiffs. The Court of Appeals correctly applies federal standards of constitutional law to the "admitted facts" set forth in the Complaint.

JURISDICTION IS LACKING

Petitioners incorrectly assume this Court has jurisdiction "in the midst of ongoing litigation" in the state trial court where discovery and pre-trial procedures are in progress. At the time of the state court appellate proceedings only a single pleading had been filed – Respondents' Complaint.

None of the criteria suggested in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) are present here. Petitioners do not state a federal issue arising from a final judgment or decision of the state courts.[4]

[4] See also, *Nike, Inc. v. Kasky*, 123 S.Ct. 2554 (2003) (Petition improvidently granted).

Granting the most liberal analysis to requirement of "finality" under 28 U.S.C. §1257, Petitioners fail to meet the required burden. The state courts below hold only that Respondents must now go forward with the burden of proof on allegations of their Complaint. Respondents not only must now prove the intentional lies they allege but, more importantly, they must overcome twenty-three (23) affirmative defenses Petitioners pleaded in their recently filed Answer. If the general denial or any one of the affirmative defenses succeeds, this matter will conclude in Petitioners' favor. Thus, Petitioners must admit that today they still have twenty-four (24) "non-federal ground" opportunities to prevail on the merits of this case.

An opinion of this Court on how much constitutional protection a political candidate shall be given in untruthfully attacking the professional reputation of his opponent's family members, business associates and non-political third parties in last minute and desperate negative attack ads is neither salutary to the public interest nor will a new rule add substance to the body of federal or state jurisprudence. In fact, granting the Petitioner candidate and his staff further license to lie in their currently ongoing 2004 campaign will add nothing to the dignity, importance and respect the public is entitled to experience in our democratic processes.

Lastly, Petitioners do not even argue, as it would be feckless to do so, that a refusal of this Court to review the state court decision "might seriously erode federal policy." If Petitioners' conduct is proven to be true, it will demonstrate that sufficient erosion to the political process is caused by them, not by decisions of the Courts. Not one of

the *Cox* criteria are met and jurisdiction does not lie with this Court.

OTHER REASONS TO DENY PETITION

Respondents concede that a candidate like Respondent Cooper and his campaign staff who, if so inclined, are free to exaggerate, misconstrue, cast aspersions, personalize, draw unfair inferences, slur, use hyperbole, overstate, understate, negatively attack and attack with gross distortions his or their opponent in order to win public office and gain public employment. Although a "good name is to be chosen rather than great riches," every unscrupulous politician also knows his or her opponent must have great riches to spend to defend their good name and reputation against defamatory campaign ads. Those candidates with hundreds of thousands of dollars for television advertising and who have no scruples against lying will fill our government offices. Candidates with less money, or more importantly candidates left with no time to defend himself or herself though imminently qualified for public office, will simply quit trying. Many already have.

A single constraint, however, does exist. A politician cannot lie. Absent such impunity, elections will devolve to even lower and more contemptible processes with respect to campaign advertising. As this Court instructs: "[t]he use of a known lie as a tool is at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana*,

374 U.S. 64, 75 (1964). Later, this Court said "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Dr. Oliver Wendell Holmes many years before said it equally well: "[s]in has many tools, but a lie is the handle which fits them all." Oliver Wendell Holmes, *The Autocrat of the Breakfast-Table* 124 (Common Reader ed., Akadine Press 2001) (1858).

Since 1931, North Carolina law in its "Corrupt Election Practices Act" draws the same bright red line this Court has pronounced more than once. N.C. Gen. Stat. § 163-247 makes it a criminal act:

* * *

> (8) For any person to cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.

The civil common law of defamation of North Carolina has also been consistent throughout the legal history of this State. North Carolina has a Constitution with a "Declaration of Rights" – enacted thirteen years before the federal "Bill of Rights" and its First Amendment. North Carolina respects, assures and enforces the right of its citizens to "speak their mind." But lying is not a right granted nor an act protected by either Constitution. This is especially true of lies against third parties and commercial entities not holding themselves out for election to a public office.

CONCLUSION

If this Court wishes to examine its prior decisions and reconsider whether deliberate lying has risen to the status of a permissible tool for Petitioners and other politicians to use in last minute and desperate, negative campaign tactics against their opponent and third-party business associates in the democratic election processes of our governments, the Petition should be granted. Otherwise, it should be denied.

Respondents submit the federal and state laws and Constitutions liberally cast the doors quite wide open for robust political rhetoric. We further submit that lying political candidates in our democratic republic, even in the hottest political race, need to feel the cool winds of honesty, propriety and decency blow across their furrowed brows.

Respectfully submitted, this 18th day of September, 2003.

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Counsel for Respondents

CHAMBERS OF SUPERIOR COURT
JUDGE HOWARD E. MANNING, JR.
10th Floor of Wake County Courthouse
Fayetteville Street Mall
Raleigh, North Carolina 27602

November 2, 2000

Re: *Donald L. Smith, et al. vs. State of North Carolina, et al., 95 CVS 6715, Wake County ("Smith Intangibles Tax Case")*

Relevant Procedural History

This action was instituted on July 7, 1995, for the purpose of obtaining refunds of intangibles taxes paid for the years 1991 through 1994 to the State of North Carolina. On June 11, 1997, this Court entered Final Judgment in the Smith Intangibles Tax Case. This Judgment directed the Department of Revenue to refund, principal and interest, to all taxpayers in Class A (all taxpayers who had paid in the intangibles tax in any year from 1991 through 1994 and who had protested the payment of the tax pursuant to Section 267. The Court dismissed the claims of the Class B taxpayers, those who had paid but not protested under Section 267. The Class Counsel (the lawyers) for the Class A taxpayers (protestors) and Class B taxpayers (non-protestors) were the law firm of Womble Carlyle Sandridge and Rice ("Womble Carlyle) and Eugene Boyce, then a sole practitioner.

On June 10, 1997, Womble Carlyle and Eugene Boyce filed a Petition for Attorney's fees and expenses for the work done on behalf of the Class A taxpayers. In their Petition, Womble Carlyle and Eugene Boyce advised the Court that they were seeking 16% of the recovery for Class A, a fee which would exceed $23,000,000.

On August 8, 1997, the Court held a hearing on Womble Carlyle and Eugene Boyce's petition for attorney's fees and expenses. Thereafter, the Court took the matter under advisement so it could review the records, time records of counsel and decide the fee petition.

On November 20, 1997, this Court entered a lengthy Memorandum of Decision and Order in which the Court denied Womble Carlyle and Eugene Boyce's petition for $23,000,000 in attorney's fees and instead, allowed Womble Carlyle and Eugene Boyce a total of attorney's fees and expenses amounting to $1,691,000, of which attorney's fees and expenses paid by the Fulton plaintiffs in a related suit would be refunded.

The only lawyers involved in this case through November 21, 1997, were lawyers from Womble Carlyle and Eugene Boyce, then a sole practitioner. The Court's Memorandum of Decision and Order on the denial of the $23,000,000 attorney's fee request is of public record in Wake County. There was no appeal from the Court's Memorandum of Decision and Order.

/s/ HEM
Sup. Ct. Judge
11/2/2000

BOYCE & ISLEY, PLLC
ATTORNEYS AT LAW

LAWYERS WEEKLY BUILDING, SUITE 100
POST OFFICE BOX 1990
RALEIGH, NORTH CAROLINA 27602-1990

G. EUGENE BOYCE
R. DANIEL BOYCE
PHILIP R. ISLEY
LAURA BOYCE ISLEY

107 FAYETTEVILLE STREET MALL
RALEIGH, NORTH CAROLINA 27601
TELEPHONE: (919) 833-7373
FACSIMILE: (919) 833-7536

November 2, 2000

VIA FACSIMILE – 835-1228

Mr. Roy Cooper, III
Campaign Headquarters
Raleigh, North Carolina

Dear Mr. Cooper:

We have reviewed the political ad that you sponsored and authorized beginning October 31, 2000. Attached is a copy of a transcript of the ad.

This firm and its members demand that you withdraw all authorization of the continued publication of the information you are reporting. We further demand that you correct the false information.

Your political ad violates North Carolina General Statutes, §163-274(8), §163-272-1, §163-276, and §§99-1-2. Ironically, our recollection is you participated in the adopting of these laws that you now violate.

Among other things, the specific false statements you and, with your funds, the media are propagating include:

1. The case you refer to, "Superior Court NC, Case No. 95 CVS 6715" ("the *protestor* intangibles tax case")

was begun in May 1995 and concluded in November 1997. At the time the *protestor* case was concluded, Dan Boyce had his own law firm, the Boyce Law Firm. Boyce & Isley, PLLC was not formed until more than a year after the *protestor* intangibles tax case was concluded. Dan Boyce, the Boyce Law Firm and Boyce & Isley, PLLC have never been involved in the *protestor* intangible tax case.

2. The case from which you derive your false accusations is not a case in which Dan Boyce ever participated. The case quoted in the television ad, Wake County Superior Court Case number 95 CVS 6715, is the *protestor* intangibles taxpayers case. The Judge quoted is the Honorable Howard E. Manning, Jr. The quote "shocks the conscience" was made in an Order entered by Judge Manning on November 21, 1997. Once again, Dan Boyce, the Boyce Law Firm and Boyce & Isley, PLLC, have never been involved with the *protestor* intangibles taxpayer case.

3. The November 21, 1997 Order also refers to a fee that is "more than a teacher's salary," which you obviously changed to read "a police officer's salary" for the purpose of aggrandizing yourself in this particular political race. Your efforts to modify the written Order to suit your political needs not only places Dan Boyce in a false light, but it also puts Judge Manning and his Order in a false light.

4. The reference you make to an alleged hourly charge of $28,000.00 also comes from the 1997 Order entered in the *protestor* intangibles taxpayer case. The hypothetical number created by Judge Manning in his November 21, 1997 Order is $28,174.00. His fee award was less than 1.5% of the recovery of $150,000,000.00.

5. To help you and all parties know the true facts, which can easily be determined with a minimum of due diligence, the cases Dan Boyce and this law firm are involved in are limited to (a) the Bailey/Emory/Paxton cases (92 CVS 10221, *et al.*) and (b) the *non-protestor* intangibles taxpayer case (98 CVS 00625) known as the "Shaver case" consolidated by Judge Manning with the "Smith B" *non-protesting* taxpayers. This consolidated case is known as the "Smith/Shaver" case. As you are certainly aware (as you participated in the legislation appropriating the settlement monies), these cases were settled with the State for $799 million and $440 million, respectively. These are the only two cases this firm has and is handling and about which Dan has spoken.

Mr. Cooper, a fundamental lesson learned in the first year of law school is to correctly identify a case name, the facts of the case and the holding of the case. You failed to even meet this standard. A simple alternative for you would have been to simply go to the courthouse and look closely at the official case record. A second alternative for you would have been to check with Judge Manning about the veracity of your charges. In fact, we spoke with Judge Manning about your accusations and falsehoods levied at Dan. We are confident, and the record supports our contention, that Dan Boyce had no involvement whatsoever in the *protestor* intangibles taxpayer case.

It is patently obvious that neither your nor any of your staff performed an investigation about the material you have placed in the public record. As you are still a licensed North Carolina attorney, we can only conclude that your published derogatory report is being done in reckless disregard of its truth or falsity. We feel that it is necessary to point out to you that such statements made

in reckless disregard of the truth could result in your removal from office should you be elected as Attorney General. The applicable statute specifically states that:

> "[a]ny public official who shall be convicted of violating any provision of Article 13 or 22 of this Chapter, in addition to the punishment provided by law, shall be removed from office by the judge presiding, and if the conviction is a felony, shall be disqualified from voting until his citizenship is restored as provided by law." *N.C.G.S. §163-276.*

We are personally (and professionally) disappointed in your conduct. Frankly, your reckless actions and your blatantly false television ads emphasize why North Carolina needs an attorney general that is more concerned about the law instead of politics. We had hoped that the Attorney General's race would set the standard for positive campaigning. However, just like every other politician, you have opted to travel the contemptible path of negative politics. We trust that you will take the appropriate and legally mandated actions to correct your false television ads.

Sincerely yours,

Boyce & Isley, PLLC

/s/ Philip R. Isley
Philip R. Isley

Enclosure
C: North Carolina Board of Elections
(*via* facsimile w/encl.)
PRI/ms

Voice: **Visuals:**

I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.

Voice Over:

Roy Cooper, endorsed by every major police organization for his record of tougher crime laws.

ENDORSED BY EVERY
MAJOR POLICE
ORGANIZATION
ROY COOPER

Dan Boyce – his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.

Sued the State

CHARGED $28,000/HOUR TO
TAXPAYERS
Source: Superior Court of NC
Case No. 95 CVS 6715

The Judge said it shocks the conscience.

IT SHOCKS THE CONSCIENCE

Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.

MORE THAN A POLICE
OFFICER'S SALARY

Dan Boyce, wrong for Attorney General

DAN BOYCE
WRONG FOR
ATTORNEY GENERAL

BOYCE & ISLEY, PLLC
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November 6, 2000

VIA FACSIMILE – 835-1228

Mr. Roy A. Cooper, III
Campaign Headquarters
Raleigh, North Carolina

Dear Mr. Cooper:

You have ignored our November 2, 2000 letter wherein we demanded that you correct the false and misleading information that you and your campaign are publishing statewide. We had hoped you would take our advice and remove all false advertisements from statewide publication. Since you continue to sponsor and publish these false statements of material fact about this law firm and Dan Boyce, our choices are to either allow the falsehoods continue to damage this firm or correct the public record. We are writing this letter before the election so that no one can say that salt is being "rubbed in your wounds" if Dan Boyce wins or that this action is "sour grapes" if he does not win. Our interest lies in the good reputation of this law firm and in fair, honest, and decent political campaigning.

It is truly unfortunate that you choose to ignore our reasonable requests to correct the public record. Your cavalier, "win at all costs" attitude about these false and misleading ads have strengthened our resolve to make sure the public knows exactly what the facts are in the court orders you quote from in your ads. Attempting to impugn members of Boyce & Isley, PLLC with your false and misleading ads steps far over the bounds of lawful and ethical conduct. As an attorney and a candidate for the top legal job in this State, you should *absolutely* know better than to publish such false and misleading ads against the members of this firm.

It is only fair that we inform you that a lawsuit will be filed against you, your campaign, members of your campaign staff and anyone else associated with preparing the false and misleading ads. Our claims for relief will include, *inter alia*, 1. Civil Conspiracy to violate N.C.G.S. § 163-274, *et seq.*; 2. Libel and Slander *Per Se*; and 3. Unfair and Deceptive Trade Practices. In addition to the other damages we are entitled to, we will be seeking a public retraction of the false and misleading ads and formal apology from all named defendants.

So as not to embarrass you or your staff before the election, a Rule 3 action will be filed with the Court. To further show our good faith, we are not going to alert any media about the filing of this action before the election. We will also seek early discovery under Rule 30 in order to establish an accurate record in preparation of a formal complaint and claims for relief. Information sought in discovery will include all information reviewed by you prior to creating and sponsoring the false and misleading ads, all drafts and final text of the ads you have prepared and sponsored (whether published or not), all names and

the statements of individuals advising you to publish the false and misleading ads, and anything else discoverable under the Rules of Civil Procedure. At this time, we plan to depose you, your communications and research manager, your field director and your campaign manager. When we obtain our order allowing for early discovery, we will notify all named defendants of the time and date of the depositions.

We have researched our legal position since the false and misleading ads have been published. We are most comfortable with the established facts contained in the public record and legal basis behind our actions. In fact, regardless of the outcome of the election, we are going to pursue these claims to set the record straight.

After reading this letter, should you decide to change your position with regard to your false and misleading ads, you may issue a written, public apology to this firm and Dan Boyce for airing ads and "standing behind them" as truthful ads. You should also send a copy of the public apology and retraction to the radio, television and print media around the state. As a component of your written apology, you will retract the ads in each and every media outlet that is running the ads. If you do this by 4:30 p.m. *today*, our efforts to set the record straight will be accomplished. We will, thereupon, not proceed with the lawsuit that is prepared and ready to file.

The damage by your false and misleading ads has been done. The ads have taken a toll in our firm's business as well as in this election. It is not too late for you to correct, for our firm's sake, the wrong that you know exists. We are not unreasonable people and if you correct the wrong, we assure you that nothing more will come of

this – regardless of the election results. It is time you took the high road on this issue. If you decide to do the right thing, you may fax me a copy of your written apology to this office before 4:30 p.m. Otherwise, we are going to have to protect our reputation and the public's interest in open and honest campaigning.

Sincerely yours,

Boyce & Isley, PLLC

/s/ Philip R. Isley
Philip R. Isley

pri/ms

Supreme Court, U.S.
FILED
SEP 29 2003
OFFICE OF THE CLERK

No. 03-176

IN THE

Supreme Court of the United States

ROY A. COOPER, III, *et al.*,

Petitioners,

v.

R. DANIEL BOYCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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REPLY BRIEF FOR PETITIONERS

The court below permitted a libel action filed by one candidate for statewide public office against his opponent to proceed because a single political advertisement used the word "charg[ed]" instead of "sought" in referring to the attempted recovery of a legal fee. Pet. at 2. The court treated this case as if it involved nothing more than speech by one private lawyer against another private lawyer (an error respondents repeat). And the court failed to identify – much less take serious account of – the robust protections the First Amendment affords political speech by one candidate for public office concerning the fitness for office of his opponent. *Id.* at 16-24. The effect of the court's determination is to have weighed the constitutional protections for core political speech against the meaning and significance of a single common word and to have found the Constitution wanting.

This Court's immediate intervention is both permissible as a jurisdictional matter, *id.* at 28, and wise as a prudential matter to curtail the otherwise unavoidable chilling effects of the decision below, *id.* at 24-29. The petition cleanly presents important First Amendment questions warranting this Court's review, and this case cannot possibly benefit from further factual development. *Id.* at 29.

Respondents fail in their opposition to join issue with any of these arguments – or any others raised in the petition. On the merits of the question presented, the only rebuttal offered by respondents is that "there is no constitutional value in false statements of fact." Opp. at 11 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). But, as explained in the petition, this Court has repeatedly stated that "erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the breathing space that they need * * * to survive." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964)

(internal quotations omitted); *see also St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones."). Indeed, respondents ignore the *Gertz* Court's recognition that, "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate." *Gertz*, 418 U.S. at 340. On the core constitutional questions at issue, respondents simply have no answer.[1]

Petitioners stand by the arguments in the petition. In light of respondents' failure to present any meaningful counter-arguments, petitioners respectfully suggest that this case may be appropriate for summary reversal.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the Court should grant the petition for a writ of certiorari.

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[1] Respondents suggest in passing, Opp. at 7-8, that some of them may not be "public figures." It should be noted, however, that respondents alleged in their complaint that they have a "statewide reputation of professionalism, honesty, integrity, and success in representing North Carolina citizens and taxpayers." App. 32. But no matter. Respondents fail to identify any legal significance of their assertion with respect to the questions raised in the petition. Indeed, given the core political speech at issue here, none of the constitutional arguments concerning constitutional falsity and defamatory injury raised in the petition turn on a "public figure" determination.

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Respectfully submitted,

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